DOCKET

No. 88-782-CFX
Status: GRANTED

Title: United States Department of Justice, Petitioner
v.
Tax Analysts

Docketed:
November 9, 1988

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Dobrovir,William A.

Entry	Date	Note	Proceedings and Orders
1	Oct 3 1988	G	Application (A88-265) to extend the time to file a petition for a writ of certiorari from October 13, 1988 to November 12, 1988, submitted to The Chief Justice.
2	Oct 5 1988		Application (A88-265) granted by the Chief Justice extending the time to file until November 12, 1988.
3	Nov 2 1988	D	Application (A88-265) to extend further the time to file a petition for a writ of certiorari from November 12, 1988 to November 22, 1988, submitted to The Chief Justice.
4	Nov 4 1988		Application (A88-265) denied by the Chief Justice.
5	Nov 9 1988	G	Petition for writ of certiorari filed.
6	Dec 8 1988		Brief of respondent Tax Analysts in opposition filed.
7	Dec 14 1988		DISTRIBUTED. January 6, 1989
8	Dec 30 1988	X	Reply brief of petitioner United States filed.
9	Jan 9 1989		Petition GRANTED. **********
10	Jan 13 1989	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	Jan 23 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	Feb 23 1989		Brief of petitioner United States filed.
13	Mar 6 1989		Record filed.
		*	Certified copy of original record and C. A. Proceedings received.
15	Mar 8 1989		SET FOR ARGUMENT, APRIL 24, 1989. (1st CASE)
16	Mar 25 1989		Brief amicus curiae of Reporters Committee for Freedom of the Press filed.
17	Mar 27 1989		Brief of respondent Tax Analysts filed.
18	Mar 28 1989		CIRCULATED.
19	Apr 17 1989	X	Reply brief of petitioner filed.
20	Apr 24 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-782

No.

Supreme Court, U.S.
FILED
NOV 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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60 pp

QUESTION PRESENTED

Whether the Tax Division of the Department of Justice, in denying Freedom of Information Act requests by the publisher of a weekly tax magazine for copies of all United States District Court opinions and orders in tax cases, "improperly withheld" documents that constitute "agency records" within the meaning of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 845 F.2d 1060. The opinion of the district court (App., *infra*, 20a-30a) is reported at 643 F. Supp. 740.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a-32a) was entered on April 29, 1988. A petition for rehearing was denied on July 15, 1988 (App., *infra*, 33a-35a). On October 5, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. * * *.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from

withholding agency records and to order the production of any agency records improperly withheld from the complainant. * * *.

* * * * *

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. * * *.

* * * * *

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. 551 provides in pertinent part:

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

* * * * *.

STATEMENT

1. This Freedom of Information Act (FOIA) case arose out of a series of 26 weekly requests submitted to the

Tax Division of the Department of Justice by respondent Tax Analysts, seeking copies of all United States District Court orders and opinions in tax cases that the Tax Division had received during the previous week. The Tax Division denied the requests. Respondent then brought this action in the United States District Court for the District of Columbia to compel the Department of Justice to provide weekly access to United States District Court decisions, opinions, and orders in tax cases as they are received by the Tax Division, and to enjoin permanently the continued withholding of such documents. App., *infra,* 22a.

The Tax Division is responsible for the prosecution and defense of all civil federal tax cases in the courts of the United States and in state courts. More than 20,000 civil tax cases are filed each fiscal year.[1] Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders rendered in the cases it handles or supervises (App., *infra,* 4a). The opinions and orders it receives in those cases are not assembled or collected into a single file. Instead, as each opinion or order is received, it is logged in to the appropriate trial section, it is then routed to the trial attorney primarily responsible for the case, and it is eventually sent to the litigation file for the case to which it relates (C.A. App. 19-20).

Respondent publishes a weekly magazine reporting legislative, judicial, and regulatory developments in the field of federal taxation, for which it charges its subscribers an annual fee of $595. The magazine includes

[1] Although the court of appeals cited this as the number of cases filed in the United States District Courts (App., *infra,* 4a), that total includes a substantial number of tax cases that are filed in either the Claims Court or the state courts. As we also noted in responses to interrogatories in this case, certain types of cases are referred directly to the office of the appropriate United States Attorney, after which the Tax Division closes its file and normally receives no further correspondence in the case (C.A. App. 16).

summaries of the most recent judicial opinions on tax issues. Respondent provides copies of documents it summarizes in return for costs. Respondent also compiles and sells subscriptions to a weekly microfiche database that supplies the full text of all judicial opinions that respondent summarizes, and respondent supplies full texts of all available court decisions in tax cases to major electronic databases on a daily basis. App., *infra,* 20a-21a.

Since 1979, the Tax Division, pursuant to FOIA, has provided respondent and other commercial tax services with weekly logs identifying the tax cases decided by the United States District Courts, the United States Courts of Appeals, and the United States Claims Court.[2] Beginning in November 1984, respondent submitted a series of 26 weekly requests to the Tax Division, seeking access to all district court decisions, opinions, and final orders identified in the log that had been released to it the previous week. Those requests were denied, and the denial was sustained on administrative appeal. Respondent then filed this action under FOIA. App., *infra,* 22a.

Although it is undisputed that the opinions are available to the public from the district courts, respondent has contended that the documents are not as a practical matter publicly available because of the difficulties respondent has encountered in obtaining the documents (App., *infra,* 25a). Respondent alleges that it must request the opinions either from the Department of Justice attorney assigned to the case or from the taxpayer's counsel. Alternatively, it must obtain the opinions through a request directed to a district court clerk, who, respondent claims, may not respond in a timely fashion or at all. Respondent must send advance payment for photocopying, and then must wait

[2] The logs list the name of each case, the docket number, the court in which the case is pending, the names of the attorneys for the taxpayer and the government, the type of case, and the date and type of judgment or order entered (App., *infra,* 22a).

for the opinion to arrive by mail (*id.* at 21a). Respondent claims that it has been unable to obtain approximately 25 percent of such opinions and orders. As the court of appeals has recognized, however, such opinions and orders are "practically unavailable" only in the sense that respondent is not "willing to expend" the resources necessary to secure them by means other than a FOIA request (*id.* at 2a n.2).

2. Following the denial of its FOIA requests and its administrative appeal from that denial, respondent filed this action, seeking to compel the Department of Justice to provide it with weekly access to all United States District Court decisions, opinions, and orders in tax cases as they are received by the Tax Division, and to obtain a permanent injunction against the continued withholding of such documents (App., *infra,* 22a). The district court granted the government's motion to dismiss the complaint, holding that 5 U.S.C. 552(a)(4)(B), which confers jurisdiction on the district court only when "agency records" have been "improperly withheld," does not apply here. The court ruled that, because the documents sought by respondent "already are available from their primary sources, the District Courts," and because the documents are "publicly available for inspection and copying almost immediately upon issuance," they cannot be deemed "improperly withheld" (App., *infra,* 25a). The court did not address the question whether the orders and opinions are "agency records" (*id.* at 23a).

The court of appeals reversed. It first rejected the district court's determination that these public documents had not been "improperly withheld" under FOIA. The court recognized that judicial opinions and orders are available to the public through the courts (App., *infra,* 2a), but it nevertheless held that FOIA requires a requested document to be made available by an agency itself

(*id.* at 11a, 14a). The court of appeals then held that, under considerations set forth in *Lindsey* v. *Bureau of Prisons,* 736 F.2d 1462, 1465 (11th Cir.), vacated, 469 U.S. 1082 (1984), the district court opinions and orders must be considered "agency records" under FOIA (App., *infra,* 17a-18a). Although the court said that it was "trouble[d]" (*id.* at 11a) by the administrative burdens that its decision would impose, and essentially acknowledged (*ibid.*) that FOIA was not intended to bring about the result reached here, the court "f[ou]nd in the words of the statute [no] exemption to cover such a situation" (*id.* at 12a). The court therefore held that the Tax Division could not refuse to provide respondent with copies of the court opinions and orders, and it remanded the case to the district court with instructions to enter an order requiring the Department of Justice "to provide some reasonable form of access to its copies of the district court opinions and orders" (*id.* at 3a). The court of appeals, with two dissenting votes, subsequently denied rehearing en banc (*id.* at 34a-35a).

REASONS FOR GRANTING THE PETITION

This case represents a plain abuse of FOIA in an effort to impose on the Executive Branch (and, ultimately, the taxpayer) costs and burdens that stem from what respondent alleges is lackadaisical performance by the Judicial Branch in making *its* records available to the public. The costs and burdens that respondent seeks to transfer to the Executive Branch are more properly borne by respondent. The decision below, moreover, incorrectly construes both the "improperly withheld" and "agency records" criteria that are prerequisites to judicial action under FOIA. On the "agency records" point, it is clear that the government would have prevailed in this action under the case law of

the Ninth Circuit dealing with other kinds of court-generated records.

There are no other cases in which courts of appeals have directly addressed the proper treatment of a request for *judicial opinions* under FOIA (a void that, in and of itself, says something about the plausibility of the D.C. Circuit's result here), but this is not a case in which we can await the development of that kind of square conflict in the circuits before seeking review in this Court. The decision below, if not reviewed by this Court, will be binding precedent in the United States District Court for the District of Columbia, where any FOIA requester always can (see 5 U.S.C. 552(a)(4)(B)) and presumably will bring any future action seeking court documents that might be covered by the reasoning of the court of appeals in this case.[3] Moreover, we submit that the Tax Division (and any other government component threatened with suit in the District of Columbia) should not be required to bear the very substantial burdens that have erroneously been imposed by the decision below during the years that it could take to develop a circuit conflict if that were even possible. For these reasons, we respectfully contend that review by this Court is appropriate at the present time.

1. FOIA gives the district courts jurisdiction "to enjoin the agency from withholding agency records and to

[3] Since the decision below was rendered, the Department of Justice has been contacted by Mead Data Central (which operates the LEXIS computer system), among others, requesting access to opinions in tax—and other—cases that are alleged to be subject to mandatory FOIA disclosure under the opinion below. If the Court permits the judgment below to become final, there is no reason to believe that other large-scale publishers of judicial opinions will refrain from demanding that the government serve as the publishers' primary source of opinions (and of other court-generated documents) in cases in which the government appears as a party, intervenor, or amicus curiae.

order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B). This Court has held that jurisdiction under FOIA "is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.' Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). The district court here, in accordance with this Court's precedent, construed the statutory phrase "improperly withheld" as one having substantive content, and the court determined that the Department of Justice did not improperly withhold anything by directing respondent to the original source of the requested documents rather than providing them itself. The court of appeals, by contrast, construed "improper[] withh[olding]" to mean virtually *any* refusal to produce documents that is not explicitly authorized by one of FOIA's enumerated exceptions (App., *infra*, 6a-8a), and it found that "[n]o exemption applies to the district court opinions" (*id.* at 8a (footnote omitted)). Accordingly, it held that there had been "improper[] withh[olding]" on the part of the Tax Division.

The term "improper[] withh[olding]," however, should not be so broadly construed—in a manner without reference to the statutory purpose. Indeed, although this Court in *Kissinger*, 445 U.S. at 150, declined to "decide the full contours of a prohibited 'withholding,' " in *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375 (1980), it determined—in contrast to the decision of the court of appeals here--that documents had not been "improperly withheld" by an agency in circumstances that were not covered by any of FOIA's exemptions. At issue in *GTE Sylvania* was a FOIA request

for various accident reports submitted by television manufacturers to the Consumer Product Safety Commission. In separate litigation, the Commission had been enjoined from disclosing those reports. The Court there (445 U.S. at 384-386) examined the legislative history of the Act to determine whether the documents had been "improperly withheld," a term that Congress had not defined in the statute. That history showed that "Congress was largely concerned with the unjustified suppression of information by agency officials" (*id.* at 385). The Court observed that "[t]he attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency * * * and on needless denials of information" (*ibid.*).[4]

There is no effort to hide mistakes or irregularities in this case, nor is there any needless denial of information.[5]

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[4] The court of appeals construed *GTE Sylvania* very narrowly (App., *infra*, 7a n.7). It viewed the situation presented by *GTE Sylvania* (*i.e.*, one in which the agency had been enjoined by a court from disclosing the documents), as the only judicially recognized exception to its construction of "improper[] withh[olding]" as defined in terms of the Act's exemptions. This Court's opinion in *GTE Sylvania*, however, does not suggest that there is only that one exception to an otherwise absolute rule. Rather, the Court relied on the general observations that we have quoted.

[5] Likewise, there is no "unjustified suppression of information by agency officials" but rather a well-justified agency position that it is the courts rather than the Department of Justice that respondent should ask to provide the documents at issue—information that no one is seeking to suppress. This Court in *GTE Sylvania* found it "enlightening that the Senate Report uses the terms 'improperly' and 'wrongfully' interchangeably" (445 U.S. at 385-386). In ordinary parlance, there is nothing "wrongful" about directing someone who requests information to the original source of that information, at least when that source is another branch of government with a strong

Indeed, there is not the slightest suggestion here that agency information is being withheld from the public. Rather, the district court orders and opinions are generated by the courts, and they are made available to the public by the courts. As the district court in this case correctly noted, "[t]he danger of 'secret agency law' is not a consideration here" (App., *infra*, 27a). In this case, as in *GTE Sylvania*, the concerns underlying FOIA are simply inapplicable.

Accordingly, the Tax Division's refusal to provide documents that the courts already make available to the public is not an improper withholding under FOIA.[6] Information that is in the public record—at a location that the agency is perfectly willing to specify—is not withheld or concealed, and an agency's refusal to copy and furnish to requesters such public documents does not restrict their availability to the public. By definition, such documents are already available to the public; accordingly, the refusal

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tradition (and sometime constitutional imperative) of permitting public access to the records of its proceedings (see App., *infra*, 24a).

[6] The court of appeals invoked, and then attacked, a straw man in response to our "improper[] withh[olding]" argument. The Act states that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section" (5 U.S.C. (Supp. IV) 552(d)), and the court of appeals relied on that language to buttress its conclusion that any refusal to provide documents not covered by a specific exemption is a wrongful withholding (App., *infra*, 8a). But we do not contend that FOIA affirmatively *authorizes* withholding of judicial opinions or limits their availability to the public; we contend only that it does not *mandate* disclosure of judicial opinions by the Executive Branch. The court of appeals construed Section 552(d) as if it meant that FOIA mandates all disclosures that it does not otherwise forbid, but that is not what the subsection says at all. All it was intended to do was to make clear that FOIA does not forbid disclosures that are required or permitted by other sources of law.

of an agency to copy and furnish to requesters documents that are publicly available at a location the agency will specify does not implicate the provisions of FOIA.[7]

Two courts of appeals have agreed with that proposition. In *SDC Development Corp.* v. *Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976) (Kennedy, J.), the court held that FOIA did not require an agency to produce a computer database of medical information, the substance of which was freely available in various publications, since the computer tapes already were made available to the public on payment of a fee. In *Lead Industries Ass'n* v. *OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (Friendly, J.), the court determined that, in response to a FOIA request, an agency did not have to provide material that already had appeared in an agency's published report, because "it is already on the public record and need not be disclosed." See also *City of West Chicago* v. *NRC*, 547 F. Supp. 740, 749 (N.D. Ill. 1982) ("Material already on the public record

[7] The court of appeals (App., *infra*, 10a) interpreted the opinion of this Court in *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 602-603 n.5 (1982), and its own decision in *Reporters Committee for Freedom of the Press* v. *United States Dep't of Justice*, 816 F.2d 730, modified, 831 F.2d 1124 (1987), cert. granted, No. 87-1379 (Apr. 18, 1988), to indicate that public availability is not sufficient to justify withholding. Those cases, however, concerned Exemptions 6 and 7(C) of the Act, 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), and did not involve an interpretation of the term "improperly withheld." The agency did not provide the requesters with the data necessary to locate the obscure records requested in those cases because the agency wanted (on invasion-of-privacy grounds) to keep the sought-after records from the requesters. By contrast, in the present case, the Department of Justice has no desire to keep respondent from obtaining the records it seeks and is willing to provide respondent with information that should suffice to allow respondent to obtain those records from the courts. See App., *infra*, 27a-28a.

need not be disclosed."). The court of appeals here acknowledged the principle that an agency need not respond to a FOIA request if the information already is available (App., *infra*, 8a-9a), but it limited that rule to situations in which the agency itself provides access to the information, stating that "it is the *agency's* responsibility to make its records available, whatever their source" (*id.* at 11a).

That limitation does conveniently serve to distinguish the *SDC* and *Lead Industries* cases on their facts (although the Second and Ninth Circuits mentioned no such limitation), but it is a principle that the court of appeals simply announced without attempting to justify it.[8] When one branch of government (here, the courts) originates the documents at issue and would ordinarily be assumed by everyone to have the responsibility for their public dissemination, there is no persuasive basis for shifting that responsibility to an agency within another branch. A mere insistence that a federal agency—and no one else—must take full responsibility for the dissemination of public documents, "whatever their source," is neither a realistic

[8] The court of appeals (App., *infra*, 11a) noted the "common knowledge that agency records often contain publicly available information, *e.g.*, newspaper clippings, other government publications," but agencies are not permitted to deny access to such documents in response to a FOIA request. That reasoning confuses the nature of the disclosure required of an agency by FOIA. The withholding of a newspaper clipping placed in an agency file does not conceal its content, for that is public; rather, it fails to disclose information about what the agency is doing with that public information. Here, the Tax Division's refusal to supply Tax Analysts with copies of district court opinions does not conceal anything about its "structure, operation and decision-making procedures" (see App., *infra*, 26a). The information in the opinions reflects no more than the district courts' adjudications in litigation, and the documents themselves are publicly available.

reading of what Congress could have intended nor a sensible rule of decision.

The court of appeals held that the public availability provided by the courts is not public availability insofar as the agency is concerned. There is neither legal nor logical support for that proposition. Public availability of documents means that the documents have been disclosed and are available to respondent and any other member of the public.[9] The court of appeals therefore erred in holding that the Department of Justice "improperly withheld" the records that respondent requested.

2. In order to hold for respondent, the court of appeals had to conclude that the public availability of documents is immaterial to FOIA's disclosure requirement, because the public availability is provided by the courts rather than by the Department of Justice. Further, the court was required to make a determination that the opinions and orders of the United States District Courts, which are expressly not subject to FOIA requests directed to the courts (see 5 U.S.C. 551(1)(B)), are nonetheless "agency records" under FOIA and must be produced on demand by an agency that has received copies of such opinions and orders. But the district court opinions and orders that respondent seeks, and that the decision requires

[9] Respondent's claim under FOIA is not based on the unavailability of the documents, but on an availability that does not satisfy its convenience. As the court of appeals saw it (App., *infra*, 2a n.2) "[o]n this record, 'practical unavailability' means inaccessibility with the resources that [respondent] has been willing to expend." Even though the reason for imposing a FOIA obligation on the Department of Justice was such perceived inaccessibility, however, the court below went on to note (*id.* at 13a) that "[t]he Department is not *required* • • • even to provide a requester-convenient location for *access*. *See Mandel Grunfield and Herrick* v. *U.S. Customs Service*, 709 F.2d 41 (11th Cir. 1983) • • •."

the Department of Justice to produce, are no more "agency records" of the Department when they have been transmitted to the Department and placed in its files than they are in the offices of the district court clerks or when they are collected in a volume of the federal reporters that an agency maintains in its library.

The Act does not define the term "agency records." It does, however, define "agency," and the courts of the United States are expressly excluded from FOIA (see 5 U.S.C. 551(1)(B)). Unquestionably the court opinions and orders sought here are records of the courts. Those documents were created by the courts as part of their function of resolving cases and controversies between parties, one of which happens to be the United States, represented by the Tax Division of the Department of Justice.

We recognize that there is only scant authority on the question whether, and in what circumstances, a document generated by another branch of government may become an agency record. Most of the cases that have addressed that issue have dealt with documents generated by another branch of government that were not publicly available, but that nevertheless were used by an agency of the Executive Branch. See, *e.g.*, *Goland* v. *CIA*, 607 F.2d 339 (D.C. Cir. 1978) (confidential transcript of congressional hearing), cert. denied, 445 U.S. 927 (1980); *Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462 (11th Cir.) (presentence report), vacated, 469 U.S. 1082 (1984).

There is, however, authority from the Ninth Circuit that directly supports our position in this case. When a public judicial record (a trial transcript) was requested under FOIA, the Ninth Circuit squarely held that such a court document is not an agency record for purposes of FOIA, even when a copy is held by the Department of Justice. *Warth* v. *Department of Justice*, 595 F.2d 521, 523 (1979). In *Berry* v. *Department of Justice*, 733 F.2d 1343, 1349 (1984), the Ninth Circuit confirmed that its case law

requires that a court-generated document be "prepared substantially to be relied upon in agency decisionmaking" before it will be deemed an "agency record" under FOIA. Judicial opinions, which are prepared to resolve cases or controversies and not particularly as an aid to agency decisionmaking, are not "agency records" under that test.[10]

The court below did not follow *Warth* and *Berry*. Rather, it adopted the multifaceted analysis used by the Eleventh Circuit to determine the status of a presentence report. See *Lindsey* v. *Bureau of Prisons, supra*. But that approach is not helpful in resolving the question here. And even under the *Lindsey* approach, the only sense in which it could be said that a court opinion is transformed into an executive agency record would be through its integration into and use as part of an agency file. As the panel recognized, "[a]gencies must use or rely on the document to perform agency business, and integrate it into their files, before it may be deemed an 'agency record' " (App., *infra*, 16a-17a). It is obvious, however, that respondent is not seeking production of *Department of Justice* records. It wants nothing more than the same court opinions that are on file in the district courts, but that are not as conven-

[10] The *Berry* court explicitly "h[e]ld that court-generated documents are agency records if they are 1) in the possession of an agency and 2) prepared substantially to be relied upon in agency decisionmaking" (733 F.2d at 1349). The court's discussion in distinguishing *Warth* makes clear that the court would deem an opinion more like the transcript at issue in *Warth* (which was not an "agency record") than like the presentence report in *Berry* (which was an "agency record"): "[In *Warth*], the trial transcript was prepared for *court* use. Although it might incidentally be used by an agency, it was not 'prepared substantially' for agency use." 733 F.2d at 1350 n.11. The *Berry* panel did suggest in the same footnote that it might have some reservations about the *Warth* decision, but it properly acknowledged (*id.* at 1349) that *Warth* remains the law of the circuit.

iently obtainable from those sources. The facts that such opinions and orders will ultimately be associated with particular Department of Justice files, and that the Tax Division may later use or rely on the opinions in those or other cases, are factors entirely irrelevant to respondent's requests.

In the context of documents generated by another branch of government, the only relevant consideration should be the control exercised by the originating branch. Here, the court of appeals purported to find that the Department of Justice controls disposition and dissemination of the documents. But it is the district courts, not the Justice Department, that have inherent control over the content and publication of their opinions. The Department of Justice has no power to suppress court documents that have been placed in the public record, and conversely it has no authority to disclose or to publicize opinions and orders that courts have ordered sealed. Cf. *Warth*, 595 F.2d at 523.

The metamorphosis of court opinions into agency records is unjustified by the Act's terms and is alien to its intent.[11] The court of appeals lost sight of FOIA's purpose

[11] This Court has heretofore addressed the definition of "agency records" on only one occasion, in two companion cases. *Kissinger* v. *Reporters Committee for Freedom of the Press, supra; Forsham* v. *Harris*, 445 U.S. 169 (1980). In the latter case, Justice Brennan observed, "[i]f • • • the significance of the record is limited to understanding the workings of the nonagency, the public has no FOIA-protected interest in access" (445 U.S. at 189 (dissenting opinion)). Although Justice Brennan was addressing the situation in which a record sheds light only on the workings of a private entity, his observation is equally pertinent to the situation in this case, in which the requested records shed light only on the workings of a different kind of "nonagency": a court (see 5 U.S.C. 551(1)(B)). The public has an interest in access, but it is an interest to be served through access provided by the judiciary, not by FOIA.

of disclosing information about agency law and operations, and the court has transformed the statute into a means to compel an agency to compile public documents that are widely scattered throughout the agency and to provide the compilation to respondent. It is plain that respondent seeks nothing specific to the Tax Division files. It simply seeks to shift to the Department of Justice the economic and administrative burden of obtaining court opinions for respondent's use.

3. The erroneous decision of the court of appeals is sufficiently important to merit this Court's attention because it would impose enormous administrative costs and burdens on the government. Respondent's request alone—just one of the many that can be expected if the reasoning of the court of appeals becomes the law—will impose very significant costs. The record reflects that an actual experiment conducted in order to determine the burden of complying with respondent's request disclosed that an experienced paralegal required 80 hours to locate 29 of the opinions identified in just one of respondent's 26 weekly requests. On the basis of that experiment, the government estimated that filling respondents' requests on a regular basis would have an annual direct compensation cost of nearly $75,000 for search time alone. C.A. App. 28-29.

Moreover, as the district court noted (App., *infra,* 29a), "the consequences of holding that time consuming or unreliable procedures for obtaining publicly available documents from a primary source or a public depository of such documents, such as a library," justify requiring an agency to produce them, would have effects far wider than this case. Nothing in the decision of the court of appeals would limit its applicability to tax cases or to the Tax Division. In 1987 alone, almost 800,000 cases were terminated in the federal courts of appeals, district courts, and

bankruptcy courts, and the United States was a party to 115,314 cases begun in the United States District Courts. *1987 Annual Report of the Director of the Administrative Office of the United States Courts* 1-31.[12] If we assume at least one opinion or order for each case that was terminated in 1987, there were several hundred thousand orders and opinions issued in that one year in cases involving the United States. If any substantial portion of those opinions and orders were to be sought for production pursuant to FOIA under the decision in this case, the logistical difficulties would be crushing. With each passing year, the opinions held for continued public access would also serve to increase the storage problems.[13]

Under this decision, commercial publishers and law firms, which previously have obtained the materials needed for their research from the courts or from other sources, would now be given both the opportunity and a substantial cost incentive to impose on federal agencies the burden of collecting and supplying basic research materials.[14] The Department of Justice, however, was not

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[12] These numbers do not encompass case filings in any of the specialized courts and other adjudicative bodies created by Congress, such as the Tax Court. Nor do they include the numerous instances in which the United States may be made a party to proceedings in the courts of the several States.

[13] In addition, requests for other court documents (such as pleadings, transcripts, exhibits, and briefs) that are publicly available, but whose availability from the Department of Justice would likely be required by the court's opinion, would significantly add to the problem.

[14] The court of appeals' assumption that the costs of providing such access may be recovered under FOIA (see App., *infra,* 12a n.13) is wholly unrealistic. The minimal duplicating fees allowed under FOIA and the regulations thereunder would never recover the costs of establishing, collecting, storing, and administering a set of records solely for the purpose of distributing copies to all requesters or making available

established as a public depository for publicly available documents, nor does FOIA require it to become one for the convenience of a requester. This decision represents an incorrect interpretation of FOIA, and in light of the extreme administrative burden that could be placed on the Department of Justice, as well as other agencies of the government that are engaged in the conduct of litigation, the question calls for resolution by this Court.

CONCLUSION

The petition for a writ certiorari should be granted.

Respectfully submitted.

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reading room-type access in response to requests such as those made by respondent. Such access also would add greatly to the difficulties of maintaining secured facilities such as the Department of Justice Building and other buildings used by the Department. Thus, contrary to the suggestion of the court of appeals (*ibid.*), there is no "existing government machinery" that can be used to provide respondent with the weekly access that it requests, and there is no way for the government to recover from respondent the full cost of creating such machinery.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5625

TAX ANALYSTS, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 85-01878)

Argued October 16, 1987
Decided April 29, 1988

Before WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and MCGOWAN,* *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: In this appeal we decide whether the Department of Justice (the Department) has any duty under the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552(a), to make available certain opinions and orders of United States District Courts that are regularly kept in its case files. Tax Analysts, a reporter and publisher of decisions and other news affecting federal tax

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* Judge McGowan concurred in the judgment but died before this opinion issued.

law, seeks access to district court decisions located in the Department's Tax Division case files.

After limited discovery and cross-motions for summary judgment, the district court held that it lacked jurisdiction because the documents were not "improperly withheld" under the FOIA. *See Tax Analysts* v. *Department of Justice*, 643 F. Supp. 740 (D.D.C. 1986). The Department, in response to an earlier FOIA request, already makes available to Tax Analysts and other tax publishers logs of the names and originating courts of the tax cases sought here.[1] So identified, the documents sought by Tax Analysts are, at least in theory,[2] available from the district courts themselves. Therefore, the court concluded that the Tax Division's refusal to make its copies available to the plaintiff did not constitute "improper withholding" forbidden by the Act. *Id.* at 745. *See* 5 U.S.C. § 552(a)(4)(A) (district court jurisdiction "to order production of agency records improperly withheld from complainant").

The issue in this case, then, is whether the Department's disclosure of the name, docket number, and other identifying information about tax cases is sufficient, in light of their availability as public documents from the district courts in question, to discharge its responsibility not to

[1] The logs include case names, docket numbers, the issuing court, the names of participating attorneys, the type of case and the date and category of judgment and order entered. *Id.* at 742.

[2] Tax Analysts argues that 25% of the decisions and orders they requested are practically unavailable on any regular basis because of recurrent difficulties in obtaining them by phone or mail from the district courts. There is, however, no indication in the record that Tax Analysts has been formally denied access to such decisions by the district courts; rather, some courts have not responded promptly (or at all) to their calls or letters. On this record, "practical unavailability" means inaccessibility with the resources that Tax Analysts has been willing to expend.

"improperly withhold" agency records.[3] We conclude that the district court decisions are agency records that must be made available to Tax Analysts by the Department itself and remand to the district court with instructions to enter an order requiring the Department to provide some reasonable form of access to its copies of the district court opinions and orders.

I.

Tax Analysts is a nonprofit organization that disseminates news and information about federal tax law through a number of printed and electronic media.[4] Since 1972, the organization's principal publication has been Tax Notes, a weekly magazine that reports summaries of decisions and news affecting federal tax law to a readership of tax attorneys, accountants, and economists. As a supplement to the magazine, Tax Analysts offers full text reporting of all federal court tax decisions in microfiche form. Tax Analysts also compiles an electronic database, Tax Notes Today, comprised of news and commentary as well as all available federal tax decisions.

In the course of its reporting, Tax Analysts has had persistent difficulty obtaining the tax decisions of some United States District Courts. While decisions of the United States Supreme Court, United States Courts of Appeals, the United States Tax Court, and the United States Claims Court can apparently be easily obtained on re-

[3] Although the district court found it unnecessary to reach the Department's alternative argument that the requested documents are not "agency records," we address that issue. *See infra* Part II. B.

[4] In our recital of the factual and procedural background of the case, we rely on undisputed facts set forth in the Joint Appendix (J.A.) and in the district court's opinion. *See* Tax Analysts v. Department of Justice, 643 F. Supp. 740 (D.D.C. 1986).

quest, Tax Analysts' undisputed claim is that securing the tax decisions rendered by the ninety-odd, far-flung federal district courts from their clerks' offices on any timely or regular basis has proven impossible. The clerks often do not respond at all to telephone requests for copies of tax opinions; even when they do, mailings take too long for prompt reporting because reproduction costs generally must be calculated and paid in advance.

Tax Analysts also has been unsuccessful in its attempts to secure the decisions from taxpayers' attorneys. As a last resort, it has sought them pursuant to the FOIA from the Tax Division of the Justice Department, which litigates, and consequently receives a copy of all decisions rendered, in the more than 20,000 tax cases filed in United States District Courts each year. Upon receipt, the Division classifies each decision as a win, partial win, or loss, and puts the decision in an individual case file. If the government prevails before the district court, and the taxpayer appeals, the case file, including the district court decision, is forwarded to the Division's appellate staff. If the taxpayer prevails, the file and decision are sent to the Solicitor General, who decides whether to take an appeal. If an appeal is prosecuted, the Division's appellate staff utilizes the case file and decision in appellate briefing and argument.

Tax Analysts' initial FOIA request to the Justice Department, filed on July 20, 1979, sought all opinions and orders received by the Tax Division earlier that month from United States District Courts, United States Courts of Appeals, and the United States Claims Court. The request was denied by the Department on the ground that the decisions were not "agency records." Tax Analysts appealed the denial but later withdrew its request. In December 1979, Tax Analysts sought and was granted access to the Division's weekly log of tax cases decided by the

federal courts. These weekly logs, which list the court, the name and nature of the case, the docket number, the attorneys for the taxpayer and the government, and the date and type of disposition, have been provided to Tax Analysts since that time.

In November 1984, Tax Analysts initiated a new request for copies of all district court decisions, opinions, and orders identified in the Division's weekly log. The Justice Department denied these requests. Tax Analysts filed this suit on July 7, 1985, seeking "weekly access" to all such district court decisions and a permanent injunction against future denial of access to such documents. After limited discovery, both parties filed motions for summary judgment.

The district court granted the Justice Department's motion to dismiss the complaint, finding that 5 U.S.C. § 552(a)(4)(B), which confers jurisdiction in the district court only when "agency records" have been "improperly withheld," did not apply here. *Tax Analysts* v. *Department of Justice*, 643 F. Supp. 740 (D.D.C. 1986). The documents sought by Tax Analysts, the court said, "already are available from their primary sources, the district courts," and because they are "on the public record" cannot be deemed "improperly withheld." *Id.* at 743-44. In the case of records already publicly available, the FOIA's primary purpose, to prevent "secret agency law," is not at risk. *Id.*

The district court also concluded that the specific relief Tax Analysts sought, *i.e.*, an injunction against any future withholding of such decisions, is unavailable under the FOIA. The requested order or injunction, the court held, "amounts to giving [Tax Analysts] automatic access to the decisions without the need for making specific FOIA requests. The FOIA refers to existing documents, not to

documents which [the Tax Division] may receive in the future." *Id.* at 745 (citations omitted). This appeal followed.[5]

II.

The government defends the district court's dismissal of the complaint, contending that none of the FOIA's three jurisdictional requirements has been met. "Under 552(a)(4)(B)," the Supreme Court has said, "federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.' Judicial authority to . . . enjoin agencies can only be invoked, under . . . § 552, if the agency has contravened all three components of this obligation." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). The district court looked no further than the first two components, holding that the requested documents could not be deemed "improperly withheld" if they were publicly available from the courts, despite practical difficulties in obtaining them promptly by mail or phone. *Tax Analysts*, 643 F. Supp. at 743-44. The government defends this rationale on appeal, and renews its additional argument that the decisions are not "agency records."

A. *Have the Documents Been "Improperly Withheld"?*

Agency records may normally be withheld only if the agency sustains its burden of proving that they fall within

[5] On appeal Tax Analysts requests only the approximately 25% of district court decisions that it has been unable to obtain by phone or mail and thus considers practically unavailable. *See* Appellant's Brief at 11.

a specific exemption in the statute.[6] *See Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 975 (D.C. Cir. 1981). Neither an agency nor a court may impose its own additional criteria as to when disclosure is proper; the settled policy of the FOIA is one of "full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).[7] Indeed, we have said more than once that a "refusal to release documents that are in [an] agency's 'custody' or 'control' for any reason other than those set forth in the Act's *enumerated* exceptions would constitute 'withholding.' " *McGehee v. CIA*, 697 F.2d 1095, 1110

[6] Congress purposely chose a "disclosure" statute, not a "withholding" one. Getman v. NLRB, 450 F.2d 670, 679 (D.C. Cir. 1971); *see also* Lykins v. Department of Justice, 725 F.2d 1455, 1460-62 (D.C. Cir. 1984) (rejecting attempts to avoid disclosure of documents on ground that they were "improperly withheld"). The statute creates a presumption in favor of disclosure. Department of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976).

[7] The only exception to this narrow interpretation of the "improperly withheld" requirement recognized so far is set forth in GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386-87 (1980), where the Supreme Court unanimously held that agency records are not "improperly withheld" when a lawful injunction by a federal court prohibits agency compliance with a FOIA request. In such cases, the Court said, the agency cannot be compelled through the FOIA to circumvent the normal procedural requirements for challenging a valid injunction. *Id.*

Here, no procedural constraint bars disclosure by the Tax Division. Indeed, the Justice Department has indicated that it will make available requested decisions and orders for those cases in which an appeal is authorized. Appellee's Brief at 28 n.22. And individual attorneys in the Division often release opinions to Tax Analysts and others.

In approximately four cases district courts have placed limits on the Department's use of their decisions. J.A. at 25-26. Such exceptional

(emphasis added; footnote omitted), *aff'd in part and vacated in part on other grounds,* 711 F.2d 1076 (D.C. Cir. 1983). Most important, the statute itself is clear on the point: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c).

No exemption applies to the district court opinions.[8] The Department maintains nonetheless that it need not affirmatively make them available to Tax Analysts because the documents have not been *withheld* to begin with; it argues that with the information already provided through the Division's logs, Tax Analysts can obtain the decisions from the originating courts themselves.

Although we can find no clear precedent on the issue, its strikes us as strange that an agency could in all cases deny access to records otherwise disclosable on the ground that they are available elsewhere. It is true that an agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access. For example, in *SDC Development Corp.* v.

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cases may well fall within the ambit of *GTE Sylvania,* but that issue is not litigated here.

[8] The government contends that even if these documents are "agency records improperly withheld," they should be exempt from disclosure under Exemption 2. 5 U.S.C. § 552(b)(2) (materials "related solely to the internal personnel rules and practices of an agency" exempt). No reasonable construction of Exemption 2 would, however, justify withholding these court decisions. The Tax Division's reliance on these opinions and orders in pursuit of its enforcement litigation, not to mention the public's obvious interest in them, makes specious any argument that the decisions relate only to "internal and personnel" matters. *See* Founding Church of Scientology v. Smith, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983).

Mathews, 542 F.2d 1116, 1119 (9th Cir.1976) (Kennedy, J.), the Ninth Circuit held that a computer database of medical information need not be disclosed in response to the FOIA request because it was already available from the agency through another statutorily prescribed means. And in *Lead Industries Ass'n, Inc.* v. *OSHA,* 610 F.2d 70 (2d Cir. 1979), Judge Friendly explained, albeit laconically, why material in an agency record that had previously appeared in the agency's final published report need not be separately disclosed pursuant to a FOIA request: "If the segment appeared, it is already on the public record and need not be disclosed."[9] *Id.* at 86. Relying on *Lead Industries,* a Seventh Circuit district court similarly denied access to preliminary drafts of a later published report primarily on Exemption 5 grounds, stating that as to matters appearing in the final version, "Material already on public record need not be disclosed." *City of W. Chicago* v. *Nuclear Regulatory Comm'n,* 547 F. Supp. 740, 749 (N.D. Ill. 1982). But whether the principle of alternative access by the same agency spills over to requests of one agency for "public record" documents obtainable from another independent source is not so clear.[10]

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[9] In *Lead Industries,* the applicant sought access to two draft reports and other documents prepared by OSHA in a rulemaking proceeding to revise the permanent standard for exposure to lead. The agency claimed and the court agreed that the portion of this information that did not appear in its final report was exempt under Exemption 5 as an internal agency memorandum reflecting the agency's deliberative process.

[10] In an unpublished decision by our own district court, Eason v. Nuclear Regulatory Comm'n, 1 G.D.S. ¶ 80,092 (D.D.C. Feb. 5, 1980), a FOIA applicant requested copies of a daily compilation of newspaper and magazine articles on nuclear energy produced at the Nuclear Regulatory Commission. The court granted summary judgment for the agency, *not* on the ground that the articles were publicly

For instance, at least one Supreme Court FOIA opinion seems to assume that public availability from a nonagency source is not sufficient by itself to justify an agency's refusal to make its records available under the FOIA. In *Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982), while the Court opined that citizenship information which is "a matter of public record somewhere in the Nation" may make it *less* likely to be exempt from disclosure under Exemption 6, 5 U.S.C. § 552(b)(6), as a clear invasion of personal privacy, it never hinted at the possibility that its public record status alone would suffice to exempt it. *Id.* at 602-03 n.5.[11] Similarly, in *Reporters Committee for Freedom of the Press* v. *Department of Justice*, 816 F.2d 730, *modified*, 831 F.2d 1124 (D.C. Cir. 1987), *cert. granted*, 56 U.S.L.W. 3711 (U.S., April 19, 1988), we held that FOIA disclosure of criminal histories does not run afoul of the privacy exemption if they are publicly available in the originating jurisdiction. No suggestion was made in this case either that the agency could meet its FOIA duty by directing the applicant to the

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available *elsewhere*, but because *the agency* in fact made the compilation available in its public reading room. Although we recognized that under our rules unpublished decisions may not be cited as precedent, D.C. Cir. Rule 14; *see also* D.C. Cir. *Handbook of Practice and Internal Procedures* 50 (1987), we refer to one here only as an illustration. We do so primarily because of the dearth of opinions, published or unpublished, dealing with comparable situations.

[11] Such citizenship information, while "a matter of public record on file in various district courts across the country," is "difficult to locate." Washington Post Co. v. Department of State, 647 F.2d 197, 199-200 (D.C. Cir. 1981) (Lumbard, J., concurring), *reversed*, 456 U.S. 595 (1982). *See also* Simpson v. Vance, 648 F.2d 10, 15 (D.C. Cir. 1980) (portions of State Department's Biographical Register *not* exempt under privacy exemption because already a matter of public record; no suggestion that requesting parties must obtain information from alternative source).

original public source for the requested record. Indeed, it is common knowledge that agency records often contain publicly available information, *e.g.*, newspaper clippings, other government publications. Yet we are aware of no court which has denied access to such documents on the ground they are available elsewhere, and several have assumed that such documents must still be produced by the agency unless expressly exempted by the Act.

The statute itself confers on the courts the power and responsibility to "enjoin the agency from withholding" disclosable records, 5 U.S.C. § 552(a)(4)(B), indicating that it is the *agency's* responsibility to make its records available, whatever their source. In common parlance, if someone asks to borrow another's newspaper, and she says, "No, go to the newstand and buy your own," she is "withholding" it. Similarly, it would be a novel interpretation of the FOIA's prohibition on "withholding," that permitted an agency to direct an applicant elsewhere for the information he sought from that agency's files.

The Department predictably points out that making and sending copies of all federal district court tax decisions to Tax Analysts on a weekly basis would create large administrative burdens. This concern weighed heavily in the district court's analysis and troubles us as well. Imposing an enormous and costly administrative burden on the Justice Department to secure already publicly available material for a commercial publication is certainly not the commonly perceived purpose of the FOIA.[12] Nonetheless,

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[12] Yet by providing meaningful access to the Tax Division's enforcement record, disclosure of practically unavailable opinions in which it has been a party may actually serve Congress' intent " 'to open agency action to the light of public scrutiny.' " Department of the Air Force v. Rose, 425 U.S. at 361 (quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)). Disclosure also serves the subsidiary FOIA purpose of providing public access to the storehouse

we cannot find in the words of the statute any exemption to cover such a situation and we are comforted somewhat by the knowledge that the burden in this case need not be so excessive as the Department makes out.[13] Compliance with the request for access to such decisions could involve no more than a memorandum to tax attorneys telling them to make an extra copy of district court decisions as they receive them and route such copies to a central file to which the plaintiffs would have access.[14] No file searches need be involved at all.

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of information that agencies gather in the course of government business. *See, e.g.*, 120 Cong. Rec. 34165 (1974) (remarks of Rep. Alexander); Freedom of Information: Hearings Before Subcomm. on Admin. Practice and Procedure of S. Judiciary Comm. on S. 1666, 88th Cong., 1st Sess. 8 (statement of Dean Earl F. English); Federal Public Records Law: Hearings Before Subcomm. of H. Comm. on Government Operations on H.R. 5012, 89th Cong., 1st Sess. 154 (1965) (statement of Rep. Wydler).

[13] The Department of Justice "estimates that it would take at least two or three paralegals working full time to respond to [Tax Analysts'] weekly FOIA requests, at an annual direct compensation cost of nearly $75,000 for search time alone." J.A. at 29. This assumes that there is no more cost-effective way of systematically disclosing the decisions. *See infra* notes 14-15 and accompanying text. Furthermore, under the Act, Tax Analysts must pay the Department's "standard charges" for search and duplication. 5 U.S.C. § 552(a)(4)(A). The Department's own regulations similarly provide for the collection of fees from requesters. *See* 28 C.F.R. §_16.10 (1987) (fee schedules, services for which charges exacted, collection procedures and charge waiver rules). This is not therefore a case in which a commercial publisher is seeking to shift its operating costs to federal taxpayers but rather one in which existing government machinery is being used to enhance the efficiency of a privately provided public service, ensuring prompt public access to federal court decisions. Such a result is not at odds with the goals of the FOIA.

[14] It appears equally plausible that those charged with filing decisions in Tax Division case files could make an extra copy and send it to a central location. *See* J.A. at 22 (indicating that one person is familiar with all case files).

Thus our decision that district court opinions qualifying as "agency records" cannot be withheld means only that extra copies of these decisions must be made available in an agency reading room.[15] The Department is not *required* by statute to mail copies of all such decisions to Tax Analysts nor even to provide a requester-convenient location for *access*. *See Mandel Grunfeld and Herrick* v. *U.S. Customs Service*, 709 F.2d 41 (11th Cir. 1983) (posting in Puerto Rican customshouse of agency records sufficient to meet FOIA obligation to Miami attorney applicant). The yoke of the FOIA in this instance may be lighter than it would appear at first glance.

At any rate, as we have incanted so often the statute does not confer judicial discretion to balance its dictates against the administrative burdens of disclosure.[16] *See Sears* v. *Gottshalk*, 502 F.2d 122, 126 (4th Cir. 1974) (burden and expense of disclosure does not justify withholding), *cert. denied sub nom. Sears* v. *Dann*, 422 U.S. 1056 (1975). Congress eliminated agency discretion to withhold information on administrative burden grounds

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[15] Under its own regulations the Department maintains a "public reference facility" where its own decisions are made available to the public. 28 C.F.R. § 16.2(4) (1987). This facility might well be used to make the requested documents in this case available to Tax Analysts and others.

[16] While the Justice Department candidly admitted at oral argument that this is "a case that is easier to decide on instincts than on law," we are constrained by the latter. If compliance with the FOIA, despite its provision for the payment of costs, takes on nightmarish qualities for agencies, congressional adjustments to the law are their own answer. *See* Getman v. NLRB, 450 F.2d at 681 (MacKinnon, J., concurring) ("If this situation is to be corrected, it will require an amendment to the Act.").

when it substituted the FOIA for section three of the Administrative Procedure Act in 1974. 5 U.S.C. § 1002 (1964) (limiting disclosure to "persons properly and directly concerned" with information). *See Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79-80 (1973). Moreover, Congress explicitly dealt with the matter of administrative expense by providing for the payment of search and duplication costs by FOIA claimants. *See supra* note 13.

In sum, we hold that in response to a FOIA request, an agency must *itself* make disclosable agency records available to the public and may not on grounds of administrative convenience avoid this statutory duty by pointing to another public source for the information. We reject the Tax Division's novel argument that it need only provide a log telling the applicant whether these decisions can be obtained elsewhere.

B. *Are the Decisions "Agency Records"?*

The district court never reached the question of whether the requested opinions and orders constituted agency records in the first place. On appeal the Justice Department renews its argument that the district court decisions sought by Tax Analysts are not "agency records" within the meaning of the FOIA.

"[T]he Freedom of Information Act, for all its attention to the treatment of 'agency records,' never defines that crucial phrase." *McGehee*, 697 F.2d at 1106. The legislative history of the FOIA is similarly unilluminating. *See id.*; *Forsham* v. *Harris*, 445 U.S. 169, 182-87 (1980) (limiting "agency records" to documents created or retained by an agency).

The Supreme Court, however, has necessarily had to probe the meaning of "agency record" on several occa-

sions. In so doing, it has emphasized agency possession as one necessary facet. *See Forsham*, 445 U.S. at 184-87. *See also Kissinger*, 445 U.S. at 150-55 (agency possession necessary for "withholding" of former agency records). There is no doubt here that the Tax Division possesses the requested documents. The Court has made clear, however, that possession alone may not suffice to transform a nonagency document into an agency record. *Forsham*, 445 U.S. at 185 n.16 (citing *Kissinger*, 445 U.S. at 157). Accordingly, we have declined to hold that documents originating in a FOIA-exempted branch, like Congress or the courts, *see* 5 U.S.C. §§ 551(1), become disclosable simply because they "eventually find their way into the hands of an agency covered by the Act." *McGehee*, 697 F.2d at 1107.

Rather, we have held that information originating in a FOIA-exempt entity may only become an "agency record" if the agency's eventual dominion over it includes the discretion to disclose it. Thus, we look for evidence surrounding the creation and transmittal of a document indicating that its creator intended to retain control. If there is none, and the document, though created elsewhere, is presently within the "free disposition of the agency with which [it] resides," it may be deemed an "agency record." *Lykins*, 725 F.2d at 1459 (quoting *Goland* v. *CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980)). For example, it has been finally determined that presentence reports, once they are transferred to the Bureau of Prisons, a FOIA agency, and used by that agency in its decisionmaking, are agency records.[17]

[17] *See* Brief for Respondent United States at 13, 15, filed in Crooker v. U.S. Parole Comm'n., 469 U.S. 926 (1984) (Solicitor General conceding that presentence reports will no longer be claimed not to be "agency records"); Lykins v. Department of Justice, 725 F.2d 1455,

The Justice Department maintains that this "control" analysis precludes disclosure of tax court decisions because there is no indication that the courts intended "to relinquish the inherent supervisory power [they have] over [their] own records." Appellee's Brief at 28. The flaw in this argument is that it confuses control over document *content* with control over disposition and dissemination of the document itself. It is axiomatic that courts and Congress—and, for that matter, all agencies—retain ultimate control over the content of the records they create. But court orders, decisions and opinions may be used, duplicated and distributed by other agencies for their own purposes without detracting from the court's basic authority to amend or vacate them.

Here, the courts retain no control over what happens to the copies of the tax decisions they distribute to the Tax Division.[18] *Cf. Goland,* 607 F.2d at 348 (documents not agency records where Congress intended to retain control). Indeed, the Tax Division already provides such documents to Tax Analysts once the government decides to prosecute an appeal. *See supra* note 7.

Of course, agency possession and power to disseminate a document are still insufficient by themselves to make it an "agency record." *See Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir.), *vacated*, 469 U.S. 1082 (1982). Agencies must use or rely on the document to per-

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1458 (D.C. Cir. 1984); Carson v. Department of Justice, 631 F.2d 1008, 1010 (D.C. Cir. 1980). *See also* Durns v. Bureau of Prisons, 804 F.2d 701 (D.C. Cir. 1986) (holding presentence reports exempt from disclosure under 5 U.S.C. § 552(b)(5)). *See generally* Note, *A Control Test for Determining "Agency Record" Status Under the Freedom of Information Act,* 85 Colum. L. Rev. 611, 616-19 (1985).

[18] In some rare instances decisions are transmitted by the courts on a confidential basis and these orders and opinions probably would not be considered "agency records." *See supra* note 7.

form agency business, and integrate it into their files, before it may be deemed an "agency record." *See Wolfe* v. *Department of Health and Human Services*, 711 F.2d 1077, 1081 (D.C. Cir. 1983). The Justice Department admits use and reliance on the requested court decisions, reporting that the "opinions and orders may be read and used by some Tax Division employees and attorneys in performing their work as representatives of a party to the litigation, including deciding whether to appeal an adverse decision, deciding litigation positions and strategy and in framing legal arguments." J.A. at 12. Moreover, the opinions and orders are classified and maintained in the official case files of the agency.[19]

The Eleventh Circuit has conveniently distilled the essence of Supreme Court and D.C. Circuit rulings into four relevant considerations for deciding whether an agency has sufficient "control" over a document to make it an "agency record." They are:

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

Lindsey v. *Bureau of Prisons*, 736 F.2d at 1465 (citations omitted). Our prior discussion indicates that the court decisions involved in this case readily pass all four parts of the test. But, by requiring that all four factors be present,

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[19] Tax Analysts claims that the Tax Division marks court decisions and orders upon receipt by using a "blocking stamp" that prints the word "record" onto the document. Our conclusion that "agency records" are involved here does not depend, however, on the cosmetics of any such practice.

the test rebuts the slippery slope argument that the FOIA necessarily covers all public reference documents that may be found in agency libraries or offices, such as treatises, dictionaries and weekly news magazines.[20] Thus not everything in an agency library nor even every court decision received by the Department of Justice is by any means an "agency record" subject to disclosure under the Act. Only those tax decisions requested by Tax Analysts that have been incorporated into Department files, are relied upon by Tax Division attorneys in their work, and remain unencumbered by judicial limitations on dissemination, constitute disclosable "agency records."

[20] These documents often will not meet the third and fourth agency records criteria mentioned above. Nonetheless, both Congress and the Supreme Court have recognized that, under certain circumstances, materials as public and innocuous as telephone directories may be subject to FOIA disclosure as agency records. *See GTE Sylvania*, 445 U.S. at 385 (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966).

CONCLUSION

We reverse the district court's decision granting the Justice Department's motion to dismiss the complaint, and remand with instructions for the court to enter relief consistent with this opinion.[21]

[21] The district court construed Tax Analysts' complaint as requesting a permanent injunction requiring "automatic access." *See* J.A. at 6-7. Plaintiff's request is more properly interpreted as a request for declaratory or injunctive relief that simply prohibits the Justice Department's current withholding policy. Our remand, therefore, contemplates only that degree or relief necessary to preclude the Tax Division from denying the weekly requests for access to the court decisions listed in the logs on the grounds asserted in this case. The Department still retains discretion over precisely how it responds to those requests, consistent with the FOIA, its own regulations, and this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

Civ. A. No. 85-1878

TAX ANALYSTS, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANT

July 31, 1986

MEMORANDUM OPINION

STANLEY S. HARRIS, District Judge.

This matter is before the Court on the parties' cross-motions for summary judgment pursuant to Fed.R.Civ.P. 56(b). Plaintiff filed this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). Upon careful consideration of the pleadings and the entire record herein, the Court concludes that defendant's motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

Background

Plaintiff, Tax Analysts, is a non-profit charitable and educational organization which publishes a weekly magazine about legislative, judicial, and regulatory developments in the field of federal taxation. Plaintiff charges an annual fee of $595 to its subscribers and provides copies of documents it summarizes in return for

costs. The magazine includes summaries of the most recent judicial opinions on tax issues; plaintiff supplies the full text of all such decisions to subscribers to its weekly microfiche data base. Plaintiff also provides on a daily basis full texts of all available court decisions in tax cases to major electronic data bases. Plaintiff states that it has been able effectively and reliably to obtain all relevant decisions handed down by the U.S. Supreme Court, U.S. Circuit Courts of Appeals, the U.S. Tax Court, and the U.S. Claims Court. However, plaintiff complains that it cannot assure its readers a timely or comprehensive reporting of U.S. District Courts' decisions. Plaintiff states that the process of obtaining these decisions is difficult, unreliable, and time consuming in that the decisions must be requested from either the Department of Justice attorney assigned to the case or from the taxpayer's counsel, if known, or more likely by request to a district court clerk, who, plaintiff complains, may not respond timely or at all. Plaintiff must send advance payment for photocopying and then wait for the decision to arrive by mail.

Defendant in this action is the Department of Justice (DOJ). The Tax Division of the DOJ is responsible for the prosecution and defense in all courts of civil tax cases other than those instituted in the United States Tax Court, over which it only has appellate responsibilities.

On July 20, 1979, plaintiff, pursuant to the FOIA, requested that the Tax Division furnish plaintiff with all opinions and orders of the United States District Courts, the United States Courts of Appeals, and the United States Court of Claims received by the defendant earlier that month. On August 2, 1979, the Tax Division denied that request on the grounds that the documents were not agency records. Plaintiff appealed that denial. Thereafter, as a result of practical difficulties in complying with plaintiff's

request, defendant asked plaintiff to withdraw the request, which plaintiff did. On December 14, 1979, plaintiff, pursuant to the FOIA, sought and was granted access to defendant's logs of the names of tax cases decided by the aforementioned courts. For the past six years, defendant has provided plaintiff and other commercial tax services with the weekly logs. The logs list the names of the case, the docket number, the district in which it is pending, the names of the attorneys for the taxpayers and the Government, the type of case, and the date and types of judgment or order entered.

Beginning November 16, 1984, and continuing until May 10, 1985, plaintiff, pursuant to the FOIA, submitted a series of 26 weekly requests to the Tax Division for access to all District Court decisions, opinions, and orders identified in the log released to plaintiff the previous week, a copy of which was attached to each request. On March 21, 1985, defendant asked plaintiff to withdraw its requests, but plaintiff declined. On April 30, 1985, the Tax Division denied plaintiff's request, and that denial was sustained on administrative appeal.

On June 7, 1985, plaintiff filed this action under the FOIA seeking weekly access from the Tax Division to all United States District Court decisions, opinions, and orders in tax cases as they are received by defendant and a permanent injunction against the continued withholding of such records.

Defendant moved for summary judgment as a matter of law, pursuant to Fed.R.Civ.P. 56(b), and plaintiff filed a cross-motion for summary judgment.

Discussion

In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980), the Supreme Court clarified the conditions under which a federal court may compel an agency to release documents. The Court stated in part:

> The FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment. That statutory scheme authorizes federal courts to ensure private access to requested materials when three requirements have been met. Under 5 U.S.C. § 552(a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation.

Id. at 151, 100 S.Ct. at 969; *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1488 (D.C.Cir. 1984); *McGehee v. Central Intelligence Agency*, 697 F.2d 1095, 1105 (D.C.Cir.1983).

The Court finds it unnecessary to decide whether District Court opinions and orders in the hands of the Tax Division of the Department of Justice, a covered agency, are "agency records," as the Court concludes that such documents have not been "improperly withheld." Because there is no improper withholding in this case, the Court lacks jurisdiction.

The documents that plaintiff seeks to have defendant make available under the FOIA are copies of all United States District Court decisions, opinions, and final orders (hereinafter "decisions") in tax cases that are received by defendant. The decisions are created by the District Courts, which have sole control over whether a written decision is prepared in a particular case and its substantive content. The decisions function not only as the means of reflecting the disposition of the parties' claims in a case, but also are integral to the courts' administrative duties by officially closing or controlling pending cases before them. The decisions are matters of public record, and courts recognize a general right to inspect and copy judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). However, every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes, *id.*, at 598, 98 S.Ct. at 1312, or where a court finds it necessary to seal the record for secrecy or privacy reasons. *See, e.g., Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Under our system of jurisprudence, the judiciary has the duty of publishing and disseminating its decisions, *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 185 (3d Cir.1976), although it is within each court's discretion to determine which decisions are appropriate for publication.

The original copy of any decision is filed with the Clerk's Office of the affected Court and placed in the official case jacket, which is available to the public through the court's file room upon personal or letter request. Copying facilities are available through the file room upon payment of costs, or, if there is a letter request, a copy will be sent upon payment of costs.

The documents that plaintiff seeks already are available from their primary sources, the District Courts. However, plaintiff argues that the decisions are not truly publicly available because of the difficulties that plaintiff has encountered in obtaining them. In reviewing the arguments presented to it, this Court does not minimize the burden or expense plaintiff may experience in requesting copies of decisions from numerous individual courts. Whatever the merits of plaintiff's complaints about the inefficiency of the District Courts' systems in responding completely and promptly to plaintiff's requests for tax decisions, those complaints do not negate the fact that the decisions are publicly available for inspection and copying almost immediately upon issuance. Plaintiff's arguments that it cannot fulfill its self-imposed duty of providing prompt information and access to tax decisions through the current system does not provide a basis upon which this Court can shift the administrative burden and expense to the Department of Justice to provide copies of, or access to, the decisions. Plaintiff has not met the jurisdictional prerequisite for the operation of the FOIA—that the requested material be "improperly withheld" by the covered agency, as the material is already available to it and other members of the public.

Case law dealing with situations where documents were allegedly "improperly withheld" under the FOIA, 5 U.S.C. § 552(a)(4)(B), support the Court's conclusion that these publicly available tax decisions are not being "improperly withheld" by the Tax Division. The term "improperly" is not defined in the FOIA itself. The Supreme Court in *GTE Sylvania, Inc. v. Consumers Union,* 445 U.S. 375, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980), relying on the legislative history of the FOIA for the Congressional intent of the term "improperly," determined that it meant the "unjustified suppression of information by agency of-

ficials." *Id.* at 385, 100 S.Ct. at 1201 (quoting S.Rep. No. 813, 89th Cong., 1st Sess., at 5 (1969)). The Court also noted that it was "enlightening that the Senate Report uses the terms 'improperly' and 'wrongfully' interchangeably." *Id.* at 386, 100 S.Ct. at 1201 (citing S.Rep. No. 813, at 3, 5, 8). In *GTE Sylvania,* the Court held that the Consumer Product Safety Commission had not improperly withheld records that were subject to a court order enjoining disclosure.

The types of documents that Congress sought to make available to the public by enacting the FOIA were primarily those which dealt with the structure, operation, and decision-making procedures of the various governmental agencies. *Weisberg v. United States Dep't of Justice,* 631 F.2d 824, 828 (D.C.Cir.1980) (quoting *SDC Development Corp. v. Mathews,* 542 F.2d 1116, 1119 (9th Cir.1976)). The legislative history of the FOIA discloses deep congressional concern with the ability of the American people to obtain information about the internal workings of their government. *SDC Development Corp., supra,* 542 F.2d at 1119 (discussing S.Rep. No. 813, 89th Cong., 1st Sess. 2-3 (1965)); H.R.Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966)).

Both *SDC Development Corp.* and *Weisberg* dealt with the issue of whether the requested materials were "agency records." However, the question of whether those records otherwise would be obtainable was key in determining if the records were disclosable under the FOIA, or whether the danger of secret agency law had arisen. In *SDC Development Corp.,* plaintiffs sought to have computer tapes containing a medical reference library furnished under the FOIA. The fact that the library reference system, the substance of which was freely available in various publications, was readily disseminated to the public by the agency for an appropriate fee, made the danger of agency secrecy

a non-consideration. In *Weisberg,* plaintiff brought a FOIA request to obtain copies of copyrighted photographs in the possession of the FBI. The D.C. Circuit Court found the photos to be "agency records," both because they reflected the operation of the agency and because "absent a FOIA request, there [was] no guarantee that the photos would be disclosed." 631 F.2d at 828.

The danger of "secret agency law" is not a consideration here because, as previously stated, the requested materials are already publicly available. Additionally, defendant already supplies plaintiff, and others, with its logs of tax decisions rendered in cases it litigates. So, plaintiff has information about which cases the Government chooses to pursue. The determination of the merits of each case, appearing as a court decision, is solely within the control of the courts who make such decisions available by their own internal procedures.

In looking at whether certain documents must be disclosed under the FOIA, courts have considered whether the documents are available from another source and the degree of difficulty involved in obtaining them from that other source. In *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), a non-FOIA case, news media sought access to court file copies of Watergate audio tapes that had been introduced into evidence at trial. The Supreme Court held that the 1974 Presidential Recordings and Materials Act, which provided procedures for obtaining access to this material, overrode the common-law right of access to judicial records. *Id.* at 607, 98 S.Ct. at 1317. The Court stated: "The presence of an alternative means of public access tips the scale in favor of denying release." *Id.* at 606, 98 S.Ct. at 1316. The relevance of *Nixon* to plaintiff's FOIA request is that the fact that plaintiff has alternative access to

the documents it seeks leads to the conclusion that such documents are not being "improperly withheld."

Material which is already on the public record need not be disclosed. *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 83, 86 (2d Cir.1979) ("Disclosure of purely objective summaries of the rule-making record may not threaten the deliberative process, [Exception 5, 5 U.S.C. § 552(b)(5)] although disclosure might be withheld on the different ground that the material was already available."); *City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 547 F.Supp. 740, 749 (N.D.Ill.1982). However, where it does not appear that a "requester could have obtained the desired information, readily, if all, by other means," *International Brotherhood of Electrical Workers v. H.U.D.*, 763 F.2d 435, 436 (D.C.Cir.1985), the balance weighs more toward ordering disclosure of material that otherwise fulfills the FOIA requirements. *Getman v. NLRB*, 450 F.2d 670 (D.C.Cir.1971) (*cited* in *International Brotherhood*), provides a clearer example of when the difficulty of obtaining the information will weigh toward disclosure. In *Getman*, an Exception 6 privacy case, plaintiffs sought from the NLRB the names and addresses of employees eligible to vote in certain elections. In ordering disclosure, the D.C. Circuit noted that "appellees [had] no other source for obtaining the names and addresses," *id.* at 676, apart from the union which might be reluctant to provide the information because of outside considerations.

Where the requested material is available from the agency's own document room, this court has held that a FOIA request for alternative means of access must be denied.[1] In

[1] Plaintiff refers to the D.C. Circuit Court's statement in *Iron & Sears v. Dann*, 606 F.2d 1215, 1222 n. 37 (1979), that "locating the kinds of decisions appellant seeks in public patent files [may] be so great a burden as to make their availablility all but meaningless." However, the court there did not rule on the issue of availability, re-

Eason v. Nuclear Regulatory Comm'n, 1 G.D.S. 80, 92 (D.D.C.1980), this Court held it lacked jurisdiction to order disclosure of a daily compilation of articles on nuclear energy apparently produced by the Commission, on the ground that no agency records had been withheld. In that case, the Court noted that the requested material already was made available to plaintiff and other members of the public in the Commission's Public Document Room on or about the date of publication. *Id.* at 93.

The documents that plaintiff seeks in this case originate with the District Courts, which make them available to the public, almost immediately upon publication. Therefore, the Court finds that these decisions are publicly available and are not being "improperly withheld" by the Department of Justice. As defendant points out, the consequences of holding that time consuming or unreliable procedures for obtaining publicly available documents from a primary source or a public depository of such documents, such as a library, would have effects far wider than this case. One result might be that a FOIA requester could request from a covered agency any documents or materials in its own library, merely because the requester may not have access either geographically or through personal physical limitations (*e.g.*, incarceration) to the public source for those materials. Such a result would clearly "ex-

manding to the District Court for a determination of other preliminary issues. In a subsequent decision on the same request, which basically involved a fee issue, the Court discussed, but did not rule on, the issue of whether the agency involved complied with the requirement of 5 U.S.C. § 552(a)(2)(A) that final opinions be made "available for public inspection and copying." *Irons v. Diamond*, 670 F.2d 265, 270-71 (D.C.Cir.1981). These speculative discussions of what were side issues in those cases do not carry precedential authority for either argument advanced here.

tend the Act well beyond the intent of Congress." *GTE Sylvania, supra,* 445 U.S. at 387, 100 S.Ct. at 1202.

As a final matter, and assuming arguendo that the Court has jurisdiction, the Court finds that plaintiff's request for a permanent injunction against the continued withholding of these decisions has no basis for support. This request amounts to giving plaintiff automatic access to the decisions without the need for making specific FOIA requests. The FOIA refers to existing documents, not to documents which defendant may receive in the future and plaintiff's claim for relief in that regard is denied. *See Eason, supra,* 1 G.D.S. at 93; *Lybarger v. Cardwell,* 577 F.2d 764, 767 (1st Cir.1978).

Accordingly, the Court grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment. An Order to that effect accompanies this Memorandum Opinion.

ORDER

Plaintiff brings this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1982). This matter is before the Court on the parties' cross-motions for summary judgment pursuant to Fed.R.Civ.P. 56(b). Upon careful consideration of the pleadings and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it hereby is

ORDERED, that defendant's motion for summary judgment is granted. It hereby further is

ORDERED, that plaintiff's motion for summary judgment is denied and its complaint is dismissed with prejudice.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5625
D.C. Civil No. 85-01878

TAX ANALYSTS, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE

Filed Apr. 29, 1988

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, Chief Judge, MIKVA, Circuit Judge, and McGOWAN*, Senior Circuit Judge

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JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

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*Judge McGowan concurred in this judgment but died before the opinion issued.

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded with instructions, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: April 29, 1988
Opinion for the Court filed by Chief Judge Wald

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5625
C.A. No. 85-01878

TAX ANALYSTS, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE

Filed Jul. 15, 1988

Before: WALD, Chief Judge, and MIKVA, Circuit Judge

ORDER

Upon consideration of appellee's petition for rehearing, filed June 13, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT
CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5625
C.A. No. 85-01878

TAX ANALYSTS, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE

[Filed July 15, 1988]

BEFORE: WALD, Chief Judge, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H GINSBURG and SENTELLE, Circuit Judges

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ORDER

Appellee's suggestion for rehearing *en banc* has been circulated to the full Court. The taking of a vote thereon was requested. Thereafter a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellee's suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Starr and Sentelle would grant the suggestion for rehearing *en banc*.

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OPPOSITION

BRIEF

No. 88-782

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

TAX ANALYSTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1988

NO. 88-782

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

TAX ANALYSTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counterstatement of the Case

This case does not present a significant federal legal issue requiring this Court's consideration. The petition for certiorari is a federal agency's grumble of objection to a FOIA-required change in its standard procedure for handling documents; one that will greatly facilitate public access to federal district court decisions, and shift the task of processing requests for copies of decisions from overburdened district court clerks to the Department of Justice, far better equipped (and budgeted) to perform it.

Respondent here is the publisher of a weekly periodical reporting to the public on federal tax matters. It requested petitioner Department of Justice's Tax Division to make cur-

rently available under the Freedom of Information Act (FOIA) the copies of federal district court tax decisions that petitioner receives in the normal course of its business. It was undisputed that respondent had "had persistent difficulty obtaining the tax decisions of some United States District Courts," App. 3a, *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1062 (D.C. Cir. 1988).

> [S]ecuring the tax decisions rendered by the ninety-odd, far-flung federal district courts from their clerks' offices on any timely or regular basis has proven impossible. The clerks often do not respond at all to telephone requests for copies of tax opinions; even when they do, mailings take too long for prompt reporting because reproduction costs generally must be calculated and paid in advance.

App. 4a, 845 F.2d at 1063.

Throughout the proceedings petitioner claimed, as it claims here, that to make the requested tax case decisions available would place an enormous burden on it. The Court of Appeals viewed that claim skeptically. It found "that the burden in this case need not be so excessive as the Department makes out." Petitioner could comply with its duties under the FOIA by doing no more than having the Tax Division attorney of record send a copy of each decision he receives to the Department's public reference room[1] in the regular interoffice mail. The court expressly remitted to petitioner "discretion over precisely how it responds to those requests, consistent with the FOIA, its own regulations, and this opinion." App. 12a-14 and *id.* nn. 13-15, 19a n. 21, 845 F.2d at 1066-67, and *id.* nn. 13-15, 1069 n. 21.

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[1]In light of petitioner's maintenance of such a facility, 28 C.F.R. § 16.2(4) (1987), App. 13a n. 15, 845 F.2d at 1067 n. 15, the reference to security considerations, Pet. at 20 n. 14, is most puzzling.

Reasons for Denying the Writ

Summary

Petitioner argues that it has not "improperly withheld" the decisions in its files. It also argues that the decisions are not its "agency records," and it claims administrative burden.

There is no doubt that petitioner possesses the documents and that it has "withheld" them. Its argument for a narrow definition of "improperly" has been consistently rejected by this Court and the courts of appeals. (I, *infra*).

By any definition of the term, petitioner's copies of court decisions in cases in which it represents the government are "agency records" as much as are the motions, briefs and other papers that it and opposing counsel file in the courts and serve on each other. Any doubt that such documents are agency records, subject to disclosure under FOIA, was laid to rest several years ago in *Crooker v. U.S. Parole Comm'n*, 469 U.S. 926 (1984), *see* App. 15a n. 17, 845 F.2d at 1068 n. 17, and again in *U.S. Dep't of Justice v. Julian*, _____ U.S. _____, 108 S.Ct. 1606 (1988). (II, *Infra*).

Petitioner's claim of administrative burden is not an excuse from FOIA compliance recognized either in the statute or by the courts. Congress recently has specified how the cost of FOIA compliance should be borne. Petitioner's claim of administrative burden and expense is addressed to the wrong Branch. (III, *infra*).

I. The Court of Appeals Held Correctly That the Records at Issue Here Were "Improperly Withheld"

Petitioner would define "improperly withheld" to include only the withholding of records to hide wrongdoing. Pet. at 10. That is not the law. In *GTE Sylvania, Inc. v. Consumers*

Union of the United States, 445 U.S. 375, 385-86 (1980), the Court explained that "'improperly' withheld" covered not only conscious effort "to hide mistakes or irregularities," but also the very kind of withholding at issue here: "needless denials of information," i.e. any denial of "requests for documents without an adequate basis for nondisclosure." As examples of the "needless denial" that Congress had in mind the Court cited the "refusal of the Secretary of the Navy to release telephone directories," and "refusal to release the names of postal employees."[2] Petitioner's refusal to grant easy public access to its files of court decisions is of the same ilk.

As this Court holds, withholding of agency records is "improper" unless justified by a stated exemption in the Act or by a specific court order (as in *GTE*). The FOIA compels "'agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976), citing S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Withholding is unauthorized "except as specifically stated" in the Act. *Id.* The nine exemptions in § 552(b) are "exclusive," 425 U.S. at 361, citing *EPA v. Mink*, 410 U.S. 73, 79 (1973), and the exemptions "must be narrowly construed." 425 U.S. at 361. Unless a specific exemption applies, "FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978).

> The system of disclosure established by the FOIA is simple in theory. A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). Congress created these exemptions because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information." Nonetheless, "[t]he mandate of the FOIA calls for broad disclosure of Government records," and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed.

[2]The Court of Appeals referred to this. App. 18a n. 20, 845 F.2d 1069 n. 20. Other examples in the House report were agency refusals to publish their rules and a description of their organization and operations. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2418, 2422-2423.

U.S. Dep't of Justice v. Julian, _____ U.S. at _____, 108 S.Ct. at 1611 (citations omitted).

Petitioner urges a new exception to this plain doctrine: that potential availability of the records elsewhere exempts the agency from FOIA's duty of disclosure. Pet. at 12-14. No case supports the argument. In each case petitioner cites the court declined to compel production of documents under FOIA where, and because, the agency itself had properly disclosed the documents in another manner; i.e., the agency had not "withheld" the documents at all. The Court of Appeals pointed this out. App. 8a-10a and *id.* nn. 9, 10, 845 F.2d at 1064-65 and *id.* nn. 9, 10.

The statute, as this Court construes it, is clear. Withholding of agency records is improper unless the agency can point to a specific provision in the FOIA excusing it from the obligation to disclose. That the records might be obtainable elsewhere does not matter.

II. The Court of Appeals Held Correctly That the Records at Issue Here are "Agency Records"

Petitioner argues that federal district court decisions it receives, incorporates into its files and uses are not its own "agency records." Its argument dredges up the pre-sentence report controversy laid to rest in *Crooker* and *Julian*. Pet. at 15-17.

A series of cases have considered the "agency record" issue for records, including pre-sentence reports, that originate outside the defendant agency but which it acquires in the normal course of its business. App. 14a-18a, 845 F.2d at 1067-69. The factors that determine whether such a document is a record of the possessor defendant agency are "distilled" into a four-part test articulated in *Lindsey v. U.S. Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir.), *vacated*, 469 U.S. 1082 (1984), and applied by the Court of Appeals here:

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

App. 17a, 845 F.2d at 1069.

Petitioner does not dispute that the records here pass the *Lindsey* test, as the Court of Appeals held. The courts have relinquished control over the copies of decisions sent to counsel. Petitioner uses its copies and files them "as it sees fit." Agency lawyers read, rely on, consider and use their copies. The copies are carefully integrated into Department of Justice files. *Lindsey*, 736 F.2d at 1465; App. 17a, 845 F.2d at 1068.

All petitioner can do is ask this Court to disapprove *Lindsey*. It asks the Court to follow *Warth v. United States Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979), instead. *Warth* held that "as a matter of law, a court document [there a trial transcript] is not an 'agency record' for purposes of the FOIA even when held by the DOJ [Department of Justice]." *Warth* not only stands alone but is dubious authority even in the Ninth Circuit. *Berry v. Dep't of Justice*, 733 F.2d 1343, 1350 n. 11 (9th Cir. 1984) (citations omitted):[3]

> Additionally, unlike *Warth*, the vast majority of federal cases to address the issue conclude that judicial transcripts in the possession of agencies constitute agency records. Those courts then look to the FOIA exemptions to determine if the documents must be disclosed. Perhaps as a result of this, *Warth* does not cite a single case in support of its ultimate holding.

Berry went on to reach the opposite result from *Warth*. It held that pre-sentence reports were agency records under FOIA. It reasoned that "agency records" should be defined to serve the FOIA goal of enabling the public to determine how agencies reach decisions. In this, *Berry* and the decision below are consistent. *Compare* 733 F.2d at 1349-50 with App. 11a n. 12, 845 F.2d at 1066 n. 12. And both decisions are consistent with the considerations that *Berry* quoted from *Forsham v. Harris*, 445 U.S. 169, 177 n. 7 (1980): "[r]eliance or use" of a document by an agency "may well be relevant ... to the question of whether a record in the possession of

[3] *Berry*, which petitioner also cites, was a pre-sentence report case like *Lindsey*, *Crooker* and *Julian*. To the extent that the *Berry* test differs from the *Lindsey* test, the difference is now moot.

an agency is an 'agency record.' " 733 F.2d at 1350. Here the agency's reliance on and use of the documents is admitted. App. 17a, 845 F.2d at 1068.

III. Petitioner's Claim of Administrative Burden Lacks Substance

Lastly, petitioner argues administrative burden and cost. Pet. at 18-20. Administrative burden is no excuse for withholding records otherwise covered by the FOIA. *See Sears v. Gottschalk*, 502 F.2d 122, 126 (4th Cir. 1974), *cert. denied sub nom. Sears v. Dann*, 422 U.S. 1056 (1975); *Ferguson v. Kelly*, 455 F.Supp. 324, 326 (N.D. Ill. 1978); *see also Long v. United States Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). Petitioner cites no cases. It has no more success in framing even a colorable legal argument here than it did in oral argument to the Court of Appeals, where it was reduced to relying only on "instinct." App. A 13a n. 16, 845 F.2d at 1067 n. 16.[4]

[4]The entire colloquy was:

> MR. COHEN [Attorney for the Department of Justice]: I think this is a case that is almost easier to decide on the basis of instinct, gut reaction.
>
> QUESTION: I know, but if that —
>
> MR. COHEN: And then you have got to make up some legal reasons for it, and that is your job. That is not Justice's job.
>
> QUESTION: But you are supposed to help us.
>
> MR. COHEN: Well, I try. I try.
>
> [Laughter]
>
> But the reaction instinctively of both lawyers and non-lay people is this isn't — and, indeed, Mr. Dobrovir says, this isn't precisely what Congress intended, this is really not what Congress intended. Now, for goodness sake, when your instinct points you that way, when the consequence seems so wanton, there ought to be some good leagl [sic] reasons. Over the course of 20 years of this statute being on the books —
>
> QUESTION: That is probably one of the more candid legal arguments.
>
> [Laughter]
>
> Tr. of Oral Argument, Tax Analysts v. U.S. Department of Justice, No. 86-5625 (D.C. Cir., October 16, 1987), at 23-24.

The Act by its existence imposes administrative burdens on agencies, for reasons that Congress decided promoted the public good. Petitioner's compliance with the Court of Appeals' decision will fulfill "the goals of the FOIA" by ensuring "prompt[er] public access to federal court decisions." App. 12a n. 13, 845 F.2d at 1066 n. 13.

Implementation of the decision below will not increase the burden of trouble and expense on the government as a whole. It will, however, shift the job of providing the public with copies of decisions from 90-odd district courts to a single central reference room at Justice. Not only will this reduce the total burden on the government, but it will relieve the courts' increasingly swamped clerks' offices of the burden altogether.[5] While perhaps not within the narrow interests of the administrative apparatus at the Department of Justice, this result is certainly in the interest of the public, the taxpayer and the government at large.

[5]The difficulty respondent has experienced in obtaining tax decisions from district court clerks reflects the workload and additional burden that such continuing requests, from respondent and others, impose on overburdened Clerk's offices, themselves constrained by Gramm-Rudman. The minimal per-copy fees that the courts are permitted to charge hardly cover the cost of the time of clerk personnel to answer Respondent's and other publishers' (CCH, Prentice-Hall, Bureau of National Affairs, Research Institute of America, Callaghan (Mertens), Lexis and Westlaw) telephone calls, note the request, find the decision, make the copy, put it in an envelope and transmit it.

Petitioner's complaints about the cost of compliance, Pet. at 18-20, are addressed to the wrong Branch, as the Court of Appeals pointed out, App. 13a n. 16, 845 F.2d at 1067 n. 16. Only a year ago Congress amended the FOIA to provide specific criteria for deciding which costs are to be borne by the requester and which by the agency. Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207, 3207-48 (1986), amending 5 U.S.C. § 552(a)(4).

Congress decided that agencies should bear the cost where disclosure will contribute significantly to public understanding of government operations, unless the requester has a strong commercial (i.e. profit) interest. 5 U.S.C. § 552(a)(4)(A)(iii) 1987); *see* Office of Management & Budget, *The Freedom of Information Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines* (*OMB Guidelines*), 52 Fed. Reg. 10012, 10013, 10017 (March 27, 1987); Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act, App. II (December 1987). Representatives of the "news media," defined to include periodicals such as respondent, are exempt from all charges but copying costs. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *OMB Guidelines*, 52 Fed. Reg. at 10014, 10015, 10018. The final determination of the charges that petitioner may properly make to respondent under the 1986 FOIA amendments and OMB and Department of Justice guidelines should be made by the District Court on remand, not by this Court as petitioner suggests, Pet. at 18.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-782

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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There is no doubt that the public should have access to the opinions of federal district courts, and this case is not about whether the public will have such access. Rather, it is an attempt by respondent to "shift the task of processing requests for copies of decisions from * * * district court clerks to the Department of Justice" (Br. in Opp. 1). As respondent takes some pains to emphasize, it is the law, and not anyone's notion of convenience, that should determine whether such a shift should take place. Yet respondent fails to meet our legal arguments, and it relies instead on a distorted picture of the operations of the courts and the Department of Justice. It is respondent, not petitioner, that has "addressed to the wrong Branch" (*id.* at 10) a plea for a massive shift of burdens from the courts (and from respondent) to the Executive Branch.

1. According to respondent, district court clerks are "overburdened," and they should not have to produce *their own* records because the "far better equipped (and budgeted)" Department of Justice is available to perform

that task (Br. in Opp. 1). To substantiate those claims, respondent repeats (without attempting to cite support, in the record or otherwise) that the clerks' offices are too "swamped" and "overburdened" to handle requests for *their* records, particularly because of "Gramm-Rudman" (*id.* at 9 & n.5). Respondent similarly expresses empathy for the supposed inability of clerks' offices to recover the expenses of providing opinions through "minimal per-copy fees" (*id.* at 9 n.5)—a situation that the Court is apparently supposed to contrast with that of the Department of Justice, which respondent must imagine is exempt from budgetary constraints and can charge lucrative fees.

Respondent has it backwards. Clerks' offices exist for the very purpose of receiving from and disseminating to the public the materials used in conducting the business of the courts; the Department of Justice exists for other purposes. Pursuant to Acts of Congress, clerks' offices have been supplying copies of judicial opinions, at appropriate fees designed to cover their direct and indirect expenses, since the eighteenth century, whereas before this case no one has ever suggested that the Department of Justice is the appropriate source for the regular flow of judicial opinions. The "shift" of that task to the Department of Justice (and other Executive Branch agencies) that respondent wants cannot be what Congress intended.

In 1799, Congress passed a statute to provide compensation for clerks of the courts of the United States, including a general provision for "reasonable compensation" for duties not otherwise covered by local rules (Act of Feb. 28, 1799, ch. 19, § 3, 1 Stat. 625). Congress later provided by statute for a specific fee for the clerk's service of providing copies of judicial records: "for a copy of any such entry or record, or of any paper on file, not exceeding one folio, ten cents; and for each additional folio, ten cents" (Act of Feb. 26, 1853, ch. 80, § 1, 10 Stat. 163). In 1925,

Congress increased that fee, permitting district court clerks to charge "[f]or a copy of any record, entry, or other paper, and the comparison thereof, 15 cents for each folio of one hundred words" (Act of Feb. 11, 1925, ch. 204, § 8(6), 43 Stat. 858). Subsequently, Congress determined to delegate to the Judicial Conference of the United States the authority to prescribe fees for services such as this (Act of Sept. 27, 1944, ch. 414, § 5, 58 Stat. 744 (now codified at 28 U.S.C. 1914(b))). The Judicial Conference initially prescribed a fee of 25 cents a page for "photographic reproduction of any record or paper." The Judicial Conference increased that fee to 50 cents a page in 1959. Starting in 1973, the Judicial Conference experimented with charging only 25 cents a page for district court opinions while retaining the 50-cent-a-page charge for other documents, but that experiment was abandoned and the 50-cent charge was reinstated in 1979. The duplication fee charged by the district courts remains 50 cents a page today.[1]

That the fees charged by district courts are intended to compensate for the clerks' direct and indirect expenses of processing requests such as respondent's is easily seen by comparing those fees with the copying fees that the Department of Justice charges for filling requests under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552.[2] By statute (5 U.S.C. (Supp. IV) 552(a)

[1] *Report of the Judicial Conference, September Session, 1945,* at 24; *Report of the Proceedings of a Special Session of the Judicial Conference of the United States, March 16, 17, 1959,* at 294; *Report of the Proceedings of the Judicial Conference of the United States, September 13-14, 1973,* at 45; *Report of the Proceedings of the Judicial Conference of the United States, March 7-9, 1979,* at 11; *Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987,* at 13.

[2] According to respondent (Br. in Opp. 10), the Department of Justice would be permitted to charge respondent *only* duplication

(4)(A)(iv)), the duplication fees that agencies can charge under FOIA are limited to their "direct costs," and the Department of Justice by regulation (28 C.F.R. 16.10(b)(2)) has set its duplication charge at ten cents per page – far less than what the courts charge. Significantly, Congress has provided in FOIA that "[n]othing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. (Supp. IV) 552(a)(4)(A)(vi)). Thus, although it is in respondent's economic interest to make the Department of Justice into a low-cost provider of the judicial opinions that respondent has heretofore sought from the courts, Congress has shown no inclination to make FOIA a taxpayer-subsidized source of records that respondent can obtain elsewhere pursuant to a fee schedule set by federal law.

We of course do not (and never did), as respondent suggests (Br. in Opp. 10), ask this Court to determine the fees that respondent should pay if it succeeds in its effort to "shift the task of processing requests for copies of decisions from * * * district court clerks to the Department of Justice" (*id.* at 1). Rather, we merely suggest that FOIA was never intended to accomplish that shift at any price. The contrast between the existing system by which the courts may recover their costs for producing *their* records, and respondent's imaginative attempt to force on the Executive Branch a system by which it will produce the courts' records at low cost, highlights the incorrectness of the decision below and the appropriateness of review by this Court.

2. Respondent argues (Br. in Opp. 3) that, because the Department of Justice possesses copies of the court orders

fees, and not search and review fees, in filling the request that the court of appeals has ordered the Department to fill here.

and opinions, but has not produced them in accordance with respondent's demands, it has "improperly withheld" the documents. As explained in our petition (Pet. 8-14), however, that simplistic allegation does not address the issue, much less resolve it. The Department of Justice has not prevented disclosure of any documents or information. The issue here is whether FOIA requires the Department of Justice to produce copies of the records of federal courts (which are exempt from FOIA, see 5 U.S.C. 552(f), 551(1)(B)), when respondent could obtain the copies from the courts themselves.

Respondent also chooses to caricature rather than address our position – with which the district court agreed – that the records in this case were not "improperly withheld" within the meaning of 5 U.S.C. 552(a)(4)(B). We did not "define 'improperly withheld' to include only the withholding of records to hide wrongdoing" (Br. in Opp. 3). Rather, in keeping with *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), we focused specifically on whether there was any "needless denials of information" (*id.* at 385). We showed that there was neither a denial of information – respondent is welcome to obtain the information it seeks from its original source, the courts, with the help of identifying information that we are happy to supply – nor needless behavior on the part of the Executive Branch – the costs of compliance with the decision of the court of appeals cannot by any stretch of the imagination be compared with a refusal to give out government telephone books or the names of postal employees (see Br. in Opp. 4). Respondent's bald assertion that "[p]etitioner's refusal to grant easy public access to its files of court decisions is of the same ilk" (*ibid.*) both ignores the facts – the Department of Justice has no "files of court decisions" that correspond to

respondent's request[3]—and draws a plainly inapt comparison.[4] The simple fact, as even the court of appeals virtually conceded (Pet. App. 11a), is that Executive Branch disclosure of judicial opinions is something that Congress never intended to require by passing FOIA.

3. Respondent seeks to divert attention from the "agency records" issue raised in our petition by adverting to the now-uncontroversial proposition that presentence reports *are* agency records (see *United States Dep't of Justice* v. *Julian*, No. 86-1357 (May 16, 1988), slip op. 5 & n.6) and then claiming that we have "dredge[d] up the presentence report controversy laid to rest" by earlier litigation (Br. in Opp. 6). To the contrary, we fully accept the proposition that presentence reports, which are prepared for use by prison and parole authorities within the Executive Branch as well as by the courts, are "agency records." But, like the Ninth Circuit in *Warth* v. *Department of Justice*, 595 F.2d 521 (1979), and *Berry* v. *Department of Justice*, 733 F.2d 1343 (1984), we urge a test that would treat presentence reports as agency records without also sweeping within that term court records that were *not* "prepared substantially to be relied upon in agency decisionmaking" (*Berry*, 733 F.2d at 1349).

The fact that the Ninth Circuit once applied that test in a case that concerned presentence reports does not, as respondent suggests (Br. in Opp. 7 n.3), make the test "moot" or rob it of any continuing usefulness. To the contrary, it shows that the test, which reaches the correct result when applied to presentence reports, is a useful and

[3] The opinions at issue here are contained in individual litigation files, not in any compilation of opinions.

[4] In any event, FOIA does not mandate "easy" access to requesters (see *Mandell Grunfeld & Herrick* v. *United States Customs Service*, 706 F.2d 41 (11th Cir. 1983)).

proper way to define the outer boundaries of "agency records" without reaching absurd results like the one reached by the court of appeals here.

Respondent finds fault with us for supposedly asking this Court to "disapprove *Lindsey* [v. *United States Bureau of Prisons*, 736 F.2d 1462 (11th Cir.), vacated, 469 U.S. 1082 (1984)] * * * [and] to follow *Warth*" (Br. in Opp. 7). Respondent's complaint is a curious one. In the first place, resolving differences between the courts of appeals on important issues is a major part of this Court's role. In the second place, *Lindsey* reached an incorrect result with respect to presentence reports (holding that they are not "agency records") and was accordingly vacated by this Court. *Warth*, as later interpreted by *Berry*, has proved flexible enough to reach the correct result with respect to presentence reports (*i.e.*, that they are "agency records") while also deeming documents such as trial transcripts (and, by obvious extension, court opinions) not "agency records," a result that we submit also is correct. *Lindsey*'s result has already been disapproved, and its reasoning, whatever utility it might have in some other context, is not a useful way to analyze FOIA requests for public court documents. Thus, it is entirely appropriate that this Court should examine the difference between the *Lindsey* approach, which the court below adopted, and the approach that the Ninth Circuit follows, which would have led readily to a result opposite the one reached below.[5]

[5] Respondent describes *Warth* as "dubious authority even in the Ninth Circuit" (Br. in Opp. 7). There is no basis for that description. As we have observed (Pet. 16 n.10), the members of the *Berry* panel suggested that they might have approached *Warth* differently as an initial matter (733 F.2d at 1350 n.11), but they deemed themselves bound by its reasoning (*id.* at 1349).

4. Respondent misconstrues our argument concerning the administrative burden imposed by the decision of the court of appeals.[6] Contrary to respondent's assertion (Br. in Opp. 8), we do not proffer the administrative burden and the cost of compliance as an "excuse for withholding records otherwise covered by the FOIA," or to voice disagreement with Congress's allocation of compliance costs. We maintain that the court opinions and orders sought by respondent are not within the purview of FOIA at all. Our description of the administrative burden of complying with the court of appeals' erroneous decision demonstrates why the case is important to the government and deserving of this Court's review.

Respondent also takes issue with our description of that administrative burden. Respondent suggests (Br. in Opp. 2), as did the court of appeals (Pet. App. 12a), that the Department of Justice could implement the court's decision by sending copies to its public reference room. The Department's public reference room is an unstaffed room that is accessible to requesters by appointment with the Department's Librarian. A security clearance or escort generally is required. Furthermore, the public reference room was never intended and has never been used as a repository for large numbers of documents culled on a weekly basis from the Department's incoming mail and

[6] Respondent also exaggerates its own burden in securing copies of district court opinions (Br. in Opp. 2). *All* that the court of appeals meant by calling the opinions at issue "practically unavailable" was that respondent has not obtained them with the effort it is *willing to expend* (Pet. App. 2a n.2). In any event, if clerks' offices are not adequately doing their job in making opinions publicly available, that is no reason to make the Department of Justice bear the burden of doing what the courts should do but (according to respondent) are not doing.

litigation files. Although the facility is suited for the occasional use that is currently made of it, it is wholly inadequate for the massive use respondent proposes.

Ultimately, the case before the Court simply is not the one that respondent addresses. It is, instead, an inappropriate effort to "shift the task of processing requests for copies of decisions from * * * district court clerks to the Department of Justice" (Br. in Opp. 1). The court of appeals was wrong to allow respondent to succeed in that effort, and this Court's correction is necessary.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
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No. 88-782

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Tax Division of the Department of Justice, in denying Freedom of Information Act requests by the publisher of a weekly tax magazine for copies of all United States district court opinions and orders in tax cases, "improperly withheld" documents that constitute "agency records" within the meaning of the Act.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 845 F.2d 1060. The opinion of the district court (Pet. App. 20a-30a) is reported at 643 F. Supp. 740.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on April 29, 1988. A petition for rehearing was denied on July 15, 1988 (Pet. App. 33a-35a). On October 5, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 12, 1988. The petition was filed on November 9, 1988, and was granted on January 9, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552 (1982 & Supp. IV 1986), provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordanc ith published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. * * *.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal

place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. * * *

* * * * *

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. * * *.

* * * * *

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. 551 provides in pertinent part:

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

* * * * *

STATEMENT

1. This Freedom of Information Act (FOIA) case arose out of a series of 26 weekly requests submitted to the Tax Division of the Department of Justice by respondent Tax Analysts, seeking copies of all United States district court orders and opinions in tax cases that the Tax Division had received during the previous week. The Tax Division denied the requests. Respondent then brought this action in the United States District Court for the District of Columbia to compel the Department of Justice to provide weekly access to United States district court decisions, opinions, and orders in tax cases as they are received by the Tax Division, and to enjoin permanently the continued withholding of such documents. Pet. App. 22a.

The Tax Division is responsible for the prosecution and defense of all civil federal tax cases in the district courts and the Claims Court and in state courts. More than 20,000 civil tax cases are filed each fiscal year.[1] Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders rendered in the cases it handles or supervises. Pet. App. 4a. The opinions and orders it receives in those cases are not assembled or collected into a single file. Instead, as each opinion or order is received, it is logged in to the appropriate trial section, it is then routed to the trial attorney primarily responsible for the case, and it is eventually sent to the litigation file for the case to which it relates. C.A. App. 19-20.

[1] Although the court of appeals cited this as the number of cases filed in the United States district courts (Pet. App. 4a), that total includes a substantial number of tax cases that are filed in either the Claims Court or the state courts. As we also noted in responses to interrogatories in this case, certain types of cases are referred directly to the office of the appropriate United States Attorney, after which the Tax Division closes its file and normally receives no further correspondence in the case (C.A. App. 16).

Respondent publishes a weekly magazine reporting legislative, judicial, and regulatory developments in the field of federal taxation, for which it charges its subscribers an annual fee of $595. The magazine includes summaries of the most recent judicial opinions on tax issues. Respondent provides copies of documents it summarizes in return for costs. Respondent also compiles and sells subscriptions to a weekly microfiche database that supplies the full text of all judicial opinions that respondent summarizes, and respondent supplies full texts of all available court decisions in tax cases to major electronic databases on a daily basis. Pet. App. 20a-21a.

Since 1979, the Tax Division, pursuant to FOIA, has provided respondent and other commercial tax services with weekly logs identifying the tax cases decided by the United States district courts, the United States courts of appeals, and the United States Claims Court.[2] Beginning in November 1984, respondent submitted a series of 26 weekly requests to the Tax Division, seeking access to all district court decisions, opinions, and final orders identified in the log that had been released to it the previous week. Those requests were denied, and the denial was sustained on administrative appeal. Respondent then filed this action under FOIA. Pet. App. 22a.

Although it is undisputed that the opinions are available to the public from the district courts, respondent has contended that the documents are not as a practical matter publicly available because of the difficulties respondent has encountered in obtaining the documents. Pet. App. 25a. Respondent alleges that it must request the opinions

[2] The logs list the name of each case, the docket number, the court in which the case is pending, the names of the attorneys for the taxpayer and the government, the type of case, and the date and type of judgment or order entered. Pet. App. 22a.

either from the Department of Justice attorney assigned to the case or from the taxpayer's counsel. Alternatively, it must obtain the opinions through a request directed to a district court clerk, who, respondent claims, may not respond in a timely fashion or at all. Respondent must send advance payment for photocopying, and then must wait for the opinion to arrive by mail (*id.* at 21a). Respondent claims that it has been unable to obtain approximately 25 percent of such opinions and orders. As the court of appeals recognized, however, such opinions and orders are "practically unavailable" only in the sense that respondent is not "willing to expend" the resources necessary to secure them by means other than a FOIA request (*id.* at 2a n.2).

2. Following the denial of its FOIA requests and its administrative appeal from that denial, respondent filed this action, seeking to compel the Department of Justice to provide it with weekly access to all United States district court decisions, opinions, and orders in tax cases as they are received by the Tax Division, and to obtain a permanent injunction against the continued withholding of such documents. Pet. App. 22a. The district court granted the government's motion to dismiss the complaint, holding that 5 U.S.C. 552(a)(4)(B), which confers jurisdiction on the district court only when "agency records" have been "improperly withheld," does not apply here. The court ruled that, because the documents sought by respondent "already are available from their primary sources, the District Courts," and because the documents are "publicly available for inspection and copying almost immediately upon issuance," they cannot be deemed "improperly withheld." Pet. App. 25a. The court did not address the question whether the orders and opinions are "agency records." *Id.* at 23a.

The court of appeals reversed. It first rejected the district court's determination that these public documents

had not been "improperly withheld" under FOIA. The court recognized that judicial opinions and orders are available to the public through the courts (Pet. App. 2a), but it nevertheless held that FOIA requires that an agency make a requested document available, even when the document is available from other sources (*id.* at 11a, 14a). The court of appeals then held that, under considerations set forth in *Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir.), vacated, 469 U.S. 1082 (1984), the district court opinions and orders must be considered "agency records" under FOIA. *Id.* at 17a-18a. Although the court said that it was "trouble[d]" (*id.* at 11a) by the administrative burdens that its decision would impose, and essentially acknowledged (*ibid.*) that FOIA was not intended to bring about the result reached here, the court "f[ou]nd in the words of the statute [no] exemption to cover such a situation" (*id.* at 12a). The court therefore held that the Tax Division could not refuse to provide respondent with copies of the court opinions and orders, and it remanded the case to the district court with instructions to enter an order requiring the Department of Justice "to provide some reasonable form of access to its copies of the district court opinions and orders." *Id.* at 3a. The court of appeals, with two dissenting votes, subsequently denied rehearing en banc (*id.* at 34a-35a).

SUMMARY OF ARGUMENT

The issue in this case is whether respondent can obtain copies of United States district court opinions and orders in tax cases from an Executive Branch agency, rather than from the courts, by requiring production of those court records under FOIA. Only if those documents are "agency records" that have been "improperly withheld" can respondent prevail.

District court orders and opinions are not "agency records." The term "agency records" is not defined in FOIA, but the legislative history of the statute shows that Congress was concerned with the unjustified suppression of information by agency officials, and that the kinds of records intended to be made accessible to the public by FOIA were those dealing with the structure, operation, and decisionmaking procedures of agencies. The opinions and orders of federal district courts are not the kinds of "agency records" at which FOIA's disclosure provisions are directed. They do not reveal anything about the operations and decisions of an "agency." They are court documents, created by the courts to reflect their dispositions of claims in cases before them, and the courts are expressly excluded from FOIA's coverage. 5 U.S.C. 552(f), 551(1)(B) (1982 & Supp. IV 1986). The fact that copies of their opinions and orders are sent to the Department of Justice, and are then associated with the litigation files of the Tax Division, does not transform them into "agency records."

The Tax Division's ability to use and disseminate its copies of the court opinions and orders is irrelevant to their status as "agency records" vel non. It is the courts that retain control over judicial opinions, including the power and duty to disseminate them to the public. Judicial opinions and orders are not prepared substantially to be relied on in agency decisionmaking; a court opinion is hardly "in effect a record which exists to serve the regulatory process." *Forsham* v. *Harris*, 445 U.S. 169, 190 (1980) (Brennan, J., dissenting). Those factors, and not the considerations derived from *Lindsey* v. *Bureau of Prisons, supra,* are decisive of the "agency records" issue in this case.

Even if we assume, arguendo, that the court opinions and orders constitute agency records, they have not been

"improperly withheld." The requested documents already are available to respondent, and to other members of the public, from the courts. Therefore, as the district court held, the Tax Division cannot be said to have "improperly withheld" them from respondent. The exemptions from disclosure enumerated in the statute do not describe the only withholdings that will be deemed not "improper[]." See *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375 (1980). As this Court indicated in *GTE Sylvania,* Congress was concerned with agency efforts to hide mistakes and irregularities and with needless denials of information. Neither concern is implicated in a case in which the precise documents that respondent seeks can be obtained from their primary sources, the courts, with the help of identifying information supplied by the Department of Justice. There simply is no basis for the statement of the court below that "it is the *agency's* responsibility to make its records available, whatever their source" (Pet. App. 11a).

Other, more general considerations support the proposition that Congress did not intend FOIA to be used to obtain publicly available court-issued materials that can be obtained from the courts. First, the disclosure provisions of FOIA itself are designed to avoid redundant disclosure of publicly available materials. See 5 U.S.C. 552(a)(2), (3). Second, the disclosure of opinions (and other court records) by the courts is itself undertaken on terms set by Congress and the Judicial Conference. Under this Court's precedents, general remedies (such as those contained in FOIA) are not construed to parallel, and to allow a claimant to bypass, procedures more specifically designed to deal with a particular situation (such as the disclosure of court records).

To require the Tax Division to act as a clearinghouse for judicial documents at the behest of requesters such as re-

spondent would extend the Act well beyond both its statutory language and the intent of Congress.

ARGUMENT

THE FREEDOM OF INFORMATION ACT CANNOT BE USED TO COMPEL THE TAX DIVISION OF THE DEPARTMENT OF JUSTICE TO PRODUCE COPIES OF ALL UNITED STATES DISTRICT COURT OPINIONS AND ORDERS IN TAX CASES

FOIA gives the district courts jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B). This Court has held that jurisdiction under FOIA "is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.' " *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). Thus, "[j]udicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation." *Ibid.* The Act does not define any of those terms, and their meaning has been left to judicial decisions interpreting the statute in particular cases. See *Kissinger*, 445 U.S. at 151; *Forsham* v. *Harris*, 445 U.S. 169, 178 (1980); *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375, 384 (1980). Here, the court of appeals, treating as irrelevant the public availability of the documents, construed "improper[] withh[olding]" to mean virtually *any* refusal to produce documents that is not explicitly authorized by one of FOIA's enumerated exemptions. Pet. App. 6a-14a. Although FOIA explicitly does not apply to the courts, see 5 U.S.C. 552(f), 551(1)(B) (1982 & Supp. IV 1986), the court of appeals further held that opinions and orders of United States district courts

are "agency records" under FOIA, and ruled that they must be produced on demand by an agency that has received copies of such opinions and orders. Pet. App. 14a-18a. The conclusion that the court of appeals reached in this case thus has the redundant effect of compelling the release to the public of documents that are already publicly available from their originators, the courts themselves. The decision serves no purpose of FOIA, but instead forces the Department of Justice into an involuntary partnership with respondent to further respondent's enterprise of selling summaries and copies of judicial opinions. Even the court of appeals acknowledged that that result is "certainly not the commonly perceived purpose of the FOIA," Pet. App. 11a, yet the court of appeals felt constrained to reach it anyway. The court's conclusion, however, misconstrues both the statutory terms "agency records" and "improperly withheld."

A. Copies of District Court Opinions and Orders in the Hands of the Department of Justice Are Not "Agency Records" Within the Meaning of FOIA

Unless documents sought pursuant to FOIA constitute "agency records," courts have no authority to order their release under the Act. 5 U.S.C. 552(a)(4)(B); *Kissinger* v. *Reporters Committee*, 445 U.S. at 155; *Forsham*, 445 U.S. at 177. As an initial matter, the records sought under FOIA must constitute the records of an "agency," as that term is defined in the statute. Among the "authorit[ies] of the United States" that are not "agenc[ies]" subject to FOIA are the Congress and the courts of the United States. 5 U.S.C. 551(1)(A) and (B), 552(f) (1982 & Supp. IV 1986). It has accordingly been recognized that the records prepared by and for the Congress and the courts generally are not covered by FOIA. *Warth* v. *Department*

of Justice, 595 F.2d 521, 523 (9th Cir. 1979); *McGehee* v. *CIA,* 697 F.2d 1095, 1107, vacated in part on other grounds, 711 F.2d 1076 (D.C. Cir. 1983); *Brown & Williamson Tobacco Corp.* v. *FTC,* 710 F.2d 1165, 1177 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). That principle stems not only from the statute's provision excluding both the courts and the Congress from its scope, but also from the policy reflected in the statute that those coequal branches of government are the keepers of their own records. *Warth* v. *Department of Justice, supra* (trial transcript is not an agency record); *Goland* v. *CIA,* 607 F.2d 339, 345-347 (D.C. Cir. 1978) (congressional hearing transcript is not an agency record), cert. denied, 445 U.S. 927 (1980).

The opinions and orders of United States district courts clearly are court records. In and of itself, the fact may not be conclusive of the "agency records" issue, for "[r]ecords of a nonagency certainly could become records of an agency as well." *Forsham,* 445 U.S. at 183. At least one narrow category of records, presentence reports, clearly does qualify as records of both the courts and Executive Branch agencies. See *United States Department of Justice* v. *Julian,* 108 S. Ct. 1606, 1610 & n.6 (1988); *Berry* v. *Department of Justice,* 733 F.2d 1343 (9th Cir. 1984). But that hardly means that all court records that come into the possession of Executive Branch agencies must or should be deemed "agency records" subject to FOIA. *Warth,* for example, holds that, as a matter of law, a judicial document—a trial transcript—in the possession of the Department of Justice does not become an agency record for FOIA purposes. See also *Valenti* v. *Department of Justice,* 503 F. Supp. 230, 233 (E.D. La. 1980) (grand jury transcript is a court record, not an agency record).

The court below did not follow *Warth*. Rather, it adopted as a four-part test certain factors mentioned by

the Eleventh Circuit in the context of presentence reports to determine whether the opinions and orders in issue here are agency records. See *Lindsey* v. *Bureau of Prisons,* 736 F.2d 1462 (11th Cir.), vacated, 469 U.S. 1082 (1984). The court of appeals stated (Pet. App. 17a) that the four relevant considerations for deciding whether an agency has sufficient "control" over a document to make it an agency record are

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

That test, whatever its merit might be in resolving the status of the somewhat unusual documents involved in *Lindsey*, is of no help in the context of court opinions and orders.[3] The latter are quintessentially judicial documents

[3] In fact, *Lindsey* does not even support the use of a four-part test to determine whether documents are agency records. Far from advocating such a four-part litmus test, the court in *Lindsey* preceded its mention of the four quoted factors by saying that "no uniform control test has developed for determining whether a document is an agency record" and that "*some* relevant considerations *include*" the four factors the court proceeded to discuss. 736 F.2d at 1465 (emphasis added). Because the court there concluded (incorrectly) that presentence reports should not be deemed agency records, it had no occasion to consider whether a document might meet all four of the listed criteria and yet not qualify as an agency record. In the present case, however, the D.C. Circuit thought that nothing else merited discussion once it was established that "all four parts of the [*Lindsey*] test" were met. Pet. App. 17a. In any event, we seriously doubt that the *Lindsey* court, which thought that even presentence reports were not agency records, would have applied its "test" in such a way as to reach the opposite conclusion with respect to judicial opinions.

whose content is under the exclusive control of the courts. If they are public, the Justice Department has no power to restrict their use or their dissemination by the courts. If they are sealed, the Department has no power to release them to others. Opinions and orders are prepared and issued to dispose of matters in litigation. They have no arcane significance; their existence does not indicate a hidden agency agenda or a body of secret law. And their meaning is not changed in any way by virtue of their association with the Justice Department's litigation files. There is not the slightest reason to believe that they were ever meant to be covered by FOIA.

The legislative history of FOIA shows that Congress was not concerned about convenient access to public judicial opinions and orders. It was concerned with the unjustified suppression of information by agency officials. As a result, the records that Congress intended FOIA to make available to the public are those reflecting the structure, operation, and decisionmaking procedures of agencies. See S. Rep. No. 813, 89th Cong., 1st Sess. 2-3, 8, 10 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966). The documents in question here reveal nothing about agency structure or any "secret law" followed by an agency. Respondent's FOIA request is no more than a straightforward demand for the production of court records. We therefore submit that the nature of the records sought by respondent demonstrates that they are not agency records.

The courts themselves have inherent supervisory power over their own records, see *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978), and have their own responsibility and provisions for making their records available to the public. See, *e.g.*, *id.* at 597-598; *Garfield* v. *Palmieri*, 193 F. Supp. 137, 143 (S.D.N.Y. 1961) (An opinion once filed with the clerk "was freely available to

any member of the public who chose to copy it or to obtain a copy from the clerk upon payment of the requisite fee. West [Publishing Company] could have obtained the opinion from the clerk's office at any time had it chosen to do so."), aff'd, 297 F.2d 526 (2d Cir.), cert. denied, 369 U.S. 871 (1962); see also *Banks* v. *Manchester*, 128 U.S. 244, 253-254 (1888); *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957); *Nash* v. *Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886). As we indicated in our reply memorandum filed at the petition stage in this case, Congress and the Judicial Conference have long worked together to ensure that district court clerks will provide copies of judicial opinions to the public for appropriate compensation.

Given the plenary judicial control over the courts' opinions and the well-established system for *court* dissemination of opinions, there is simply no good reason why an undefined term in a statute governing *agency* dissemination of records should be expansively construed so as to bring opinions within its ambit. See *Warth* v. *Department of Justice, supra*. Indeed, the D.C. Circuit itself has previously acknowledged that "special policy considerations militate against a rule compelling disclosure of records originating in [the Congress, the courts, or the personal staff of the President] merely because such documents happen to come into the possession of an agency." *McGehee* v. *CIA*, 697 F.2d at 1107. And, as this Court cautioned in *Forsham*, 445 U.S. at 181-182, it would do violence to the scheme of FOIA to circumvent an express limitation of the statute by providing access to otherwise excluded documents through an agency that is subject to FOIA.

In *Forsham*, this Court stopped short of setting forth a rigid test to determine under what circumstances records generated by a nonagency (there a private party doing

medical research pursuant to federal grants) would be converted into "agency records" for purposes of FOIA. The Court merely noted that as a prerequisite to such records' becoming agency records, "an agency must first either create or obtain a record" (*id.* at 182). Nevertheless, the Court declined (*id.* at 185 n.16) to "indicate * * * that physical possession * * * is by itself always sufficient" to transform nonagency documents into agency records. The lower courts, following *Forsham*, on occasion have adopted a "control" test, under which evidence surrounding the creation and transmittal of nonagency documents is considered, to determine whether the creator of the documents intended to retain "control," or whether the agency has assumed "control" of documents. See, *e.g.*, *Berry* v. *Department of Justice*, 733 F.2d at 1349; *Carson* v. *Department of Justice*, 631 F.2d 1008, 1011-1013 (D.C. Cir. 1980).[4] But both those cases (like *Lindsey* v. *Bureau*

[4] The court in *Carson* concluded that presentence reports had become agency records, because control of those documents had been transferred from the court to the agency by virtue of the enactment of specific provisions, *i.e.*, Fed. R. Crim. P. 32 and the Parole Commission and Reorganization Act, 18 U.S.C. 4201 *et seq.*, which not only required the courts to disclose the contents of the reports to criminal defendants, but also required the Parole Commission to consider the reports and provide a requesting prisoner reasonable access to the reports. As noted in *Carson*, 631 F.2d at 1011, "[t]hese changes have both reduced the control over the report vested in the originating body and increased the control in the agency in whose possession the document resides." In a similar vein, the Ninth Circuit also ruled in *Berry* that presentence reports are agency records. The basis for its conclusion (accommodating its prior holding in *Warth* and this Court's decision in *Forsham* v. *Harris*) was that, in order to establish agency "control" of a court document in its possession, the document must have been "prepared substantially to be relied upon in agency decisionmaking." 733 F.2d at 1349. In expressing in this Court our own view that the decisions in *Carson* and *Berry* with respect to the "agency records"

of Prisons, supra, on which the court of appeals relied) involved presentence reports, whose status as "agency records" is no longer a matter of controversy (see *United States Department of Justice* v. *Julian*, 108 S. Ct. 1606, 1610 & n.6 (1988)).

The documents in question here are unlike presentence reports. The federal district court opinions and orders were prepared in furtherance of the courts' function of resolving the claims of parties in litigation. Although the Department of Justice may represent one of the parties in litigation, it cannot be said that the district courts have prepared their opinions and orders "substantially to be relied upon in agency decisionmaking," as is the case with presentence reports, which are used by parole authorities in making parole decisions (see note 4, *supra*). Department attorneys "rely on" judicial opinions only in the way that any litigator "relies on" the opinions and orders of courts: to learn of the disposition of certain cases and to obtain guidance on the probable disposition of other, similar cases in the future. That is not the kind of reliance that suggests that the record in question is an "agency record" of the Department of Justice.

issue were correct, we too emphasized that "[t]he background of [the 1983] amendment to Rule 32(a)(1) * * * conforms to the policy of the Parole Act, which contemplates that presentence reports will play a crucial role in parole determinations and in effect deems the presentence report to be prepared for the eventual use of the Parole Commission as well as the more immediate use of the sentencing court." Brief for the Respondent in Opposition at 14, *Crooker* v. *United States Parole Commission*, 469 U.S. 926 (1984). Notwithstanding our concession that presentence reports, with their unique dual function, are "agency records," we cautioned that "documents generated by the courts and Congress that come into the possession of an agency subject to the FOIA [should not be] too readily deemed to be 'agency records.'" *Id.* at 12.

The court of appeals rejected the government's argument that it is significant that the courts retain authority over their opinions and orders on the ground that "this argument * * * confuses control over document *content* with control over disposition and dissemination of the document itself." Pet. App. 16a. The court of appeals reasoned that court orders and opinions "may be used, duplicated and distributed by other agencies for their own purposes without detracting from the court's basic authority to amend or vacate them." *Ibid.* But in following that line of reasoning, the court essentially was using a test of simple possession to transform a nonagency document into an agency record, subject only to the limitation that a record that an agency possesses but is not free to disseminate might not be deemed an "agency record." That is not the law under this Court's holdings in *Forsham* and *Kissinger*.[5]

Nor is there any indication that the Tax Division has assumed "control" over the opinions and orders. It is no more in control of them than is any other legal representative of a litigant, or indeed any stranger to the litigation who happens to obtain a copy of the opinion or order. The opinions of the courts tell the agency how it may act; they do not embody agency action.

To hold that district court opinions and orders are agency records would not further the purpose of FOIA. The principal purpose of FOIA is to enable the public to know what agencies of the Executive Branch are doing and to avoid secret agency law. See *SDC Development Corp.* v. *Mathews*, 542 F.2d 1116, 1119 (9th Cir. 1976) (Kennedy, J.). These documents, however, show what the *courts* are doing, in public proceedings, and as such they simply do

[5] Nor, before this case, was it the law in the District of Columbia Circuit. See *McGehee* v. *CIA*, 697 F.2d at 1107.

not fall within the contemplation of FOIA. The court of appeals lost sight of the central purpose of the Act, and the test it constructed requires the Tax Division to provide respondent with compilations of court documents that are widely scattered throughout the agency.[6]

Moreover, respondent seeks nothing specific to the Tax Division files. It wants nothing more than the same court opinions that are on file in the district courts. That such opinions and orders ultimately are or will be associated with individual litigation files in the Department of Justice, and that the Tax Division may make use of the documents in those or other cases, are factors entirely irrelevant to respondent's requests.[7] Respondent's interest in

[6] The court of appeals opined (Pet. App. 17a-18a) that its four-part test precludes arguing that under its holding FOIA "necessarily covers all public reference documents that may be found in agency libraries or offices." The court believed that such documents often would not meet the third and fourth criteria of its test, *i.e.*, the extent to which agency personnel have read or relied on the document, and the degree to which the document was integrated into the agency's record system or files. Arguably, however, a file of legislative documents that agency personnel have read, for example, may satisfy the test for disclosure constructed by the court of appeals. And, indeed, the court was unwilling to foreclose the possibility that even library reference materials would qualify as agency records subject to FOIA disclosure. *Id.* at 18a n.20.

[7] That is why this case differs from most if not all instances in which a requester may seek newspaper clippings from an agency (see Pet. App. 11a). The fact that an agency has shown enough interest in particular newspaper clippings to integrate them into its files may shed light on the workings of the agency, whereas giving respondent every opinion that the Tax Division receives, when respondent already has the information necessary to secure those opinions from their primary sources, would tell respondent nothing about how the Tax Division works. See note 12, *infra*. Moreover, the repeated reliance by the court of appeals on hypothetical examples involving newspapers underemphasizes a distinction that surely bears heavily on any ra-

obtaining the documents from the Department of Justice rather than from the courts relates solely to its own convenience and commercial motivation. Respondent in fact admits that this case is nothing more than an effort to "shift the task of processing requests for copies of decisions from * * * district court clerks to the Department of Justice." Br. in Opp. 1; see also Pet. App. 25a.

The court of appeals thought all of these considerations irrelevant to the task of determining whether judicial opinions are agency records, but it was error to disregard them. The dissenting opinion in *Forsham* proposed a more expansive interpretation of the term "agency records" than the majority's, but it expressly recognized—as the court of appeals here did not—that factors similar to the ones we have discussed provide important limitations on that term. Thus, it is of singular importance in determining whether something is an "agency record" to examine whether "the importance of the information to public understanding of the decisions or the operation of the agency is great." *Forsham*, 445 U.S. at 188-189 (Brennan, J., dissenting). Here, the importance of the information to public understanding of the decisions or operations of the FOIA-covered agency, the Department of Justice, is minuscule if not wholly nonexistent.[8] Because "the significance of the record is limited to understanding the workings of the nonagency [the court], the public has no FOIA-protected interest in access." *Id.* at 189.

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tional analysis of the issues in this case: newspapers are not, like the documents at issue here, the key records of a coequal branch of government. Nothing in the undefined statutory terms "agency records" and "improper withholding" requires a court to ignore that distinction, yet the court of appeals has done precisely that.

[8] Because some district court opinions may describe agency actions that led to the litigation, it perhaps cannot be said that they will *never* shed *any* light on the working of a FOIA-covered agency. Yet we

Likewise, the views of those Members of this Court who would have construed "agency records" most expansively in *Forsham* were significantly less expansive than the holding of the court of appeals here that *any* level of agency reliance on a document, coupled with the other three (relatively inconsequential) *Lindsey* factors, makes that document an "agency record." The court of appeals found it conclusive that "[t]he Justice Department admits use and reliance on the requested court decisions, reporting that the 'opinions and orders may be read and used by some Tax Division employees and attorneys * * *.'" Pet. App. 17a. Yet "FOIA does not give the public any unrestricted right to examine all data relied on by an agency." *Forsham*, 445 U.S. at 189 (Brennan, J., dissenting). There must also be a "link * * * such that the agency has treated the record as if it were part of the regulatory process, as if it were in effect a record which exists to serve the regulatory process." *Id.* at 189-190; see also *id.* at 191 ("I doubt that the information could be held to be an 'agency record' had the Government not been so deeply involved in its creation."). For that reason, the Ninth Circuit in *Warth* and *Berry* was quite right to limit the term "agency records" to those documents "prepared substantially to be relied upon in agency decisionmaking," *Berry*, 733 F.2d at 1349, and the D.C. Circuit here was wrong to treat the mere fact that judicial opinions may be read by Justice

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doubt that, for example, the Justice Department library's copy of former Attorney General Francis Biddle's autobiography, *In Brief Authority* (1962), is any more an agency record than the same library's copy of former Justice William O. Douglas's autobiography, *The Court Years* (1980), just because the former more than the latter sheds light on the workings of the Justice Department. It would be equally absurd to construe the term "agency record" to cover either of those library books so as to make them subject to mandatory disclosure in response to FOIA requests.

Department employees as a sufficient basis for deeming them "agency records."

Indeed, the reasoning of the court of appeals acknowledges virtually no bounds on the extent to which all federal agencies, not just the Tax Division of the Department of Justice, can be compelled to become taxpayer-subsidized lending libraries for general materials that agencies keep on hand simply for reference. The elaborate, and often quite forgiving, fee structure under FOIA, see generally 5 U.S.C. 552(a)(4)(A) (Supp. IV 1986), ensures that this will not be the only case in which a requester would find it economically preferable to make a FOIA-covered agency do the work, and bear most of the expense, of compiling documents that the requester could and should have obtained more naturally from some other public source. That is not, we submit, what Congress intended at all in making "agency records" available under FOIA.

Had the court of appeals construed the term "agency records" in accordance with the policies that animate the statute containing that phrase, it would not have reached the admittedly "trouble[some]" (Pet. App. 11a) result that it did reach. This case involves court records, not agency records, and the contrary determination of the court of appeals should be reversed.

B. The Tax Division's Refusal to Produce Copies of All United States District Court Opinions and Orders Was Not an "Improper Withholding" Under FOIA Because the Documents Are Made Available to the Public by the Courts

FOIA does not authorize an injunction unless the agency has "improperly withheld" agency records. 5 U.S.C. 552(a)(4)(B). The documents respondent seeks to obtain under FOIA are created by the courts, are a matter of

public record as soon as they are issued, and may be inspected and copied by the public at that time. In these circumstances, it cannot realistically be said that the Tax Division "improperly withheld" the documents. The district court was therefore correct in ruling that the Department of Justice did not improperly withhold anything by directing respondent to the original source of the requested documents, rather than by providing them itself. Pet. App. 27a. The court of appeals, by contrast, construed the phrase to include virtually any refusal to produce documents that is not explicitly authorized by one of FOIA's enumerated exemptions, without regard to the documents' public availability. *Id.* at 6a-8a. Finding that "[n]o exemption applies to the district court opinions" (*id.* at 8a), it held that there had been "improper[] withh[olding]" by the Tax Division.

The term "improper withholding" should not be construed so mechanically. This Court, in *Kissinger* v. *Reporters Committee*, 445 U.S. at 150, expressly declined to "decide the full contours of a prohibited withholding." And in *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375 (1980), the Court determined—in contrast to the court of appeals here—that documents had not been "improperly withheld" by an agency in circumstances that were not covered by any of FOIA's exemptions. At issue in *GTE Sylvania* was a FOIA request for various accident reports submitted by television manufacturers to the Consumer Product Safety Commission. In separate litigation, the Commission had been enjoined from disclosing those reports. This Court examined the legislative history of the Act to determine whether the documents had been "improperly withheld." 445 U.S. at 384-386. That history showed that "Congress was largely concerned with the unjustified suppression of

information by agency officials." *Id.* at 385. The Court observed that "[t]he attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency * * * and on needless denials of information." *Ibid.*

The court of appeals read *GTE Sylvania* exceedingly narrowly, and treated the situation presented there as the only conceivable situation in which a court might refrain, on the ground that records were not "improperly withheld," from ordering the production of records that are not within a 5 U.S.C. 552(b) exemption (Pet. App. 7a n.7). It wholly disregarded the underlying concerns of Congress that provided the basis for this Court's decision in that case. After *GTE Sylvania*, it simply is not permissible to maintain that courts must order *every* disclosure that is not within a statutory exemption and may not ask, in addition to whether a statutory exemption applies, whether there is an "improper[] withh[olding]." Rather, a court considering an improper-withholding issue must engage in the more substantive task of determining whether there has been, at a minimum, some "needless denial of information."

Here, the Tax Division has furnished respondent all of the information it should need to obtain the records it seeks from the governmental unit primarily responsible for disseminating those records. That action by the agency is not a denial of information at all, nor is it in any way unreasonable, let alone "needless." Cf. *Kissinger* v. *Reporters Committee*, 445 U.S. at 166 (Stevens, J., concurring in part and dissenting in part) ("[i]f the explanation is reasonable, then the withholding is not improper"). The proposition that "it is the *agency's* responsibility to make its records available, whatever their source" (Pet. App. 11a), lacks all relationship to Congress's desire to prevent the hiding of irregularities and needless denials of information.[9] And that congressional policy is particularly free from jeopardy when the entity that *is* the source of the records *does* have legal responsibility for their public dissemination, according to centuries of legal tradition

[9] The court of appeals sought to justify that proposition by stating that "[t]he statute itself confers on the courts the power *and responsibility* to 'enjoin the agency from withholding disclosable records,' 5 U.S.C. § 552(a)(4)(B)." Pet. App. 11a (emphasis added). That statement, however, does not justify the court's conclusion, for at least two reasons. First, Section 552(a)(4)(B) merely confers *jurisdiction* to enter an injunction; it says nothing about the responsibility to do so. As this Court has observed on this precise point in the context of other statutes, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987). Professor Kenneth Culp Davis had made the same point with respect to FOIA itself: "The Information Act contains no mandatory provision for its judicial enforcement. * * * The court has jurisdiction to enforce; it is not commanded to enforce." Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 767 (1967); see also *Renegotiation Board* v. *Bannercraft Corp.*, 415 U.S. 1, 18-20 & n.18 (1974) (noting that Section 552(a)(4)(B) confers "jurisdiction" and "power" and that district court's powers under FOIA are those of an equity court). Second, even if one accepts the court's premise that an injunction is mandatory once it is established that an agency has improperly withheld agency records, it is a complete non sequitur to conclude that an agency has the "responsibility to make its records available, whatever their source" (Pet. App. 11a). Whether an agency has that responsibility depends on how one construes the statutory phrase "improperly withheld"; the mere observation that the court may or must enter an injunction once an improper withholding has been identified says nothing about how to distinguish improper withholdings from permissible agency behavior.

and practice that Congress has regularly recognized and approved (see pp. 14-15, *supra*; p. 30, *infra*).[10]

Here, as in *GTE Sylvania*, the concerns underlying FOIA are inapplicable. There is no effort to hide mistakes or irregularities committed by an agency, and there is not the slightest suggestion that agency information is being withheld from the public. As the district court in this case correctly noted, "[t]he danger of 'secret agency law' is not a consideration here." Pet. App. 27a. There is no indication that Congress was in any way concerned with providing access to public court documents through FOIA, and documents that are from a known, public source do not implicate the purposes of FOIA. Given the "enlightening" fact that "the Senate Report uses the terms 'improperly' and 'wrongfully' interchangeably," *GTE Sylvania*, 445 U.S. at 386 (quoting S. Rep. No. 813, *supra*, at 3, 5, 8), it is exceedingly difficult to see what is improper or wrongful about referring a requester to the principal, public source of records generated by another branch instead of providing those records directly.[11]

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[10] To paraphrase *Nixon* v. *Warner Communications*, 435 U.S. at 605-606, "[b]ecause of th[e] congressionally prescribed avenue of public access we need not weigh the parties' competing arguments as though the [Justice Department] were the only potential source of information regarding these * * * materials. The presence of an alternative means of public access tips the scales in favor of denying release."

[11] The court of appeals (Pet. App. 10a) interpreted this Court's opinion in *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 602-603 n.5 (1982), and its own decision in *Reporters Committee for Freedom of the Press* v. *United States Dep't of Justice*, 816 F.2d 730, modified, 831 F.2d 1124 (1987), cert. granted, 108 S. Ct. 1467 (argued Dec. 7, 1988), to indicate that public availability is not a sufficient basis on which to justify withholding. Those cases, however, concerned Exemptions 6 and 7(C) of the Act, 5 U.S.C. 552(b)(6) and (7)(C) (1982 & Supp. IV 1986), and did not involve an

Two courts of appeals have agreed with the proposition that FOIA does not require agencies to disclose that which is available from a known public source. In *SDC Development Corp.* v. *Mathews*, 542 F.2d at 1120, the court held that FOIA did not require an agency to produce a computer database of medical information, the substance of which was freely available in various publications, since the computer tapes already were made available to the public on payment of a fee. In *Lead Industries Ass'n* v. *OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (Friendly, J.), the court determined that, in response to a FOIA request, an agency did not have to provide material that already had appeared in an agency's published report, because "it is already on the public record and need not be disclosed." See also *City of West Chicago* v. *NRC*, 547 F. Supp. 740, 749 (N.D. Ill. 1982) ("Material already on the public record need not be disclosed."). The court of appeals here acknowledged the principle that an agency need not respond to a FOIA request if the information already is available (Pet. App. 8a-9a), but it limited that rule to situations in which the agency itself provides access to the information, stating that "it is the *agency's* responsibility to make its records available, whatever their source" (*id.* at 11a).

That limitation may serve to distinguish the *SDC* and *Lead Industries* cases on their facts (although neither the Second nor the Ninth Circuit gave such a narrow scope to

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interpretation of the term "improperly withheld." The agency did not provide the requesters with the data necessary to locate the obscure records requested in those cases because the agency wanted (on invasion-of-privacy grounds) to keep the sought-after records from the requesters. By contrast, in the present case, the Department of Justice has no desire to keep respondent from obtaining the records it seeks, and is willing to provide respondent with information that should suffice to allow respondent to obtain those records from the courts. See Pet. App. 27a-28a.

its holding), but as we observed above there is nothing in the statute that compels adoption of such a narrow view of the availability of requested materials.[12] When one branch of government (here, the courts) generates the documents at issue, and would ordinarily be assumed by everyone to have the responsibility for their public dissemination, there is no persuasive basis for shifting that responsibility to an agency within another branch. To insist that a federal agency, and no one else, must take full responsibility for the dissemination of public documents, "whatever their source," is neither a realistic reading of what Congress could have intended nor a sensible rule of decision. Furthermore, there is neither legal nor logical support for the court of appeals' holding that the public availability provided by the courts is not public availability insofar as the agency is concerned. Public availability of documents means that the documents have been disclosed and are available to respondent and to any other member of the public.[13]

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[12] The court of appeals (Pet. App. 11a) noted the "common knowledge that agency records often contain publicly available information, *i.e.*, newspaper clippings, other government publications," but it said that agencies are not permitted to deny access to such documents in response to a FOIA request. That reasoning confuses the nature of the disclosure required of an agency by FOIA. The withholding of a newspaper clipping placed in an agency file does not conceal its content, for that is public; rather, it fails to disclose information about what the agency is doing with that public information. Here, the Tax Division's refusal to supply respondent with copies of district court opinions does not conceal anything about the Tax Division's "structure, operation, and decision-making procedures" (see Pet. App. 26a). The information in the opinions reflects no more than the district courts' adjudications in litigation, and the documents themselves are publicly available.

[13] Respondent's claim under FOIA is not based on the unavailability of the documents, but on an availability that does not satisfy its

Other provisions of FOIA buttress the conclusion that Congress did not intend the statute to create a redundant means of access to documents that a requester can already obtain from a public, governmental source. Section 552(a)(2) requires an agency, in specified circumstances, to make available for public inspection and copying final opinions made in the adjudication of cases, certain statements of policy and interpretation, and certain administrative staff manuals and instructions. But the obligation to make those materials available for public inspection and copying does not apply if "the materials are promptly published and copies offered for sale." Section 552(a)(1) specifies certain matters that must be published in the *Federal Register*. But Section 552(a)(3), the general provision regarding the disclosure of agency records, excludes from its scope those documents that already have been made available under Sections 552(a)(1) and 552(a)(2). In short, agency records that have already been published, or have been made available for inspection and copying, need not be made available in response to a specific FOIA request. *A fortiori*, a judicial record that is a public document should not be subject to a FOIA request.

Congress has shown no inclination to make FOIA a taxpayer-subsidized source of records that a requester can

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convenience. In the language of the court of appeals (Pet. App. 2a n.2), "[o]n this record, 'practical unavailability' means inaccessibility with the resources that [respondent] has been willing to expend." But while the court based its ruling on such perceived inaccessibility, it noted (*id.* at 13a) that "[t]he Department is not *required* • • • even to provide a requester-convenient location for *access*. *See Mandel Grunfield and Herrick* v. *U.S. Customs Service*, 709 F.2d 41 (11th Cir. 1983) • • •." See also *Nolen* v. *Rumsfeld*, 535 F.2d 890, 892 (5th Cir. 1976) ("The Act requires only availability, not delivery."), cert. denied, 429 U.S. 1104 (1977).

obtain elsewhere pursuant to a fee schedule set by federal law. Indeed, in 5 U.S.C. 552(a)(4)(A)(vi) (Supp. IV 1986), Congress has provided that "[n]othing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." By statute, Congress has delegated to the Judicial Conference of the United States the authority to prescribe fees for services such as copying court documents. 28 U.S.C. 1914(b). The courts charge 50 cents per page for copies of judicial opinions, whereas the Justice Department's copying charge is only 10 cents per page. See *Report of the Proceedings of the Judicial Conference of the United States, March 17, 1987*, at 13; 28 C.F.R. 16.10(b)(2). Even at that, the Justice Department is often precluded from charging the full 10 cents. See, *e.g.*, 5 U.S.C. 552(a)(4)(A)(iv)(II) (Supp. IV 1986) (no charge to noncommercial requesters for first 100 pages of duplication).

We submit that the foregoing provides a sufficient basis to conclude that the court of appeals erred as a simple matter of statutory construction, but there is yet another reason why the judgment should be reversed. Even if FOIA were, "by its terms, literally applicable" to this case, it would not follow that the courts should allow its use in the face of another statute more precisely drawn to govern the provision of court records to the general public. See *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976) (and cases there cited); see also *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984). In holding that it must reach a result not in keeping with "the commonly perceived purpose of the FOIA," just because it could not "find in the words of the statute any exemption to cover such a situation" (Pet. App. 11a-12a), the court of appeals forgot Chief Justice Marshall's admonition that, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 6

U.S. (2 Cranch) 358, 386 (1805), quoted in *Brown* v. *GSA*, 425 U.S. at 825. Here, as in *Brown*, the question is whether Congress intended that two parallel statutory schemes, one designed to deal with the precise situation at hand and one designed primarily to deal with other matters, were meant to provide two very different ways of achieving the same result.[14] And here, as in *Brown*, it "would require the suspension of disbelief" (425 U.S. at 833) to credit the proposition that Congress intended in 28 U.S.C. 1914 and FOIA to provide two ways to get publicly available court opinions, and to do so by "imposing an enormous and costly administrative burden on the Justice Department" (Pet. App. 11a) when courts can perform the same task with minimal burden for appropriate compensation.

The purpose of Congress in enacting FOIA, as this Court has observed (*GTE Sylvania*, 445 U.S. at 385), was to prevent "the unjustified suppression of information by agency officials." That concern is not implicated here. The policies of FOIA are not advanced by the court of appeals' construction of the statute, which would obligate the Tax Division to become a clearinghouse for documents that are publicly available from the coordinate branches of government that are their sources.

---

[14] The Court in *Brown* considered whether one claiming discrimination in federal employment could sue under general statutes that permit civil rights claims or was instead limited to the remedies provided by Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. The Court concluded that the latter provision is exclusive.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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Freuhauf Corp. v. IRS, 522 F.2d 284 (6th Cir. 1975) 25

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GTE Sylvania v. Consumers Union of the United States, 445 U.S. 375 (1980) 10, 16, 23, 24

Gulf Oil Corporation v. Copp Paving Co., Inc., 419 U.S. 186 (1974) 20

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) 9, 11, 12

Landers v. National R.R. Passengers Corp., 108 S.Ct. 1440 (1988) 20

Lead Industries Ass'n v. OSHA, 610 F.2d 70 (2nd Cir. 1979) 24

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United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) 21

Warth v. Department of Justice, 595 F.2d 521 (9th Cir. 1979) 13

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Anti-Drug Abuse Act of 1986, P.L. 99-570
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Congressional Materials

H.R. Rep. No. 1419, 92nd Cong., 2nd Sess.
(1972) 25

H.R. Rep. No. 1497, 89th Cong., 2nd Sess.
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S. Rep. No. 813, 89th Cong., 1st Sess.
(1965).....17, 18

S. Rep. No. 854, 93rd Cong., 2nd Sess. (1974).....18

S. Rep. No. 221, Freedom of Information
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Hearings Before the Subcommittee on the
Constitution, Senate Judiciary Committee
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S. 1751, July 15, 22, 31, Sept. 24,
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Statement of Stephen J. Markman, Assistant
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Freedom of Information Act and Amendments of
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Freedom of Information Act Source Book:
Legislative Materials, Cases, Articles,
93rd Cong., 2nd Sess. (1974).....17, 18, 24

Miscellaneous

U.S. Department of Justice, *The
Attorney's Guide to the Organization and
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U.S. Department of Justice, Office of Legal
Policy, *Freedom of Information Case List,
Justice Department Guide to the Freedom
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U.S. Department of Justice,
*Attorney General's Memorandum on the Public
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U.S. Department of Justice,
*Attorney General's Memorandum on the 1986
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*Reports of the Proceedings of the Judicial
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Administrative Office of the United States Courts,
1988 Annual Report of the Director, Appendix I,
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K. Davis, *Administrative Law Treatise* (Supp. 1970) 26

A. Scalia, *The Freedom of Information Act Has No Clothes*, Regulation, Mar/April 1982 15

T. Troyer & A. Lauber, *Supreme Court's TWR Decision Provides Guidance in 501(c)(3) Lobbying*, 59 J. Tax'n (1983) 3

P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 Emory L. J. (1984) 27

Bush Likely to Ask Lower Capital Gains Tax, N. Y. Times, Jan. 31, 1989, A17 2

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-782

UNITED STATES DEPARTMENT OF JUSTICE

Petitioner,

v.

TAX ANALYSTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

At stake in this action is the public's ability to learn the content of federal district court decisions in tax cases as soon as petitioner Department of Justice's Tax Division and its client, the Internal Revenue Service, learn it.

Respondent and Its Request

Respondent is a nonprofit, charitable and educational organization. Its purpose is to increase the public's knowledge and understanding of federal tax laws, regulations, administration and interpreta-

tion, and of current issues in taxation. Affidavit of Thomas F. Field in *Tax Analysts v. Department of Justice*, C.A. No. 85-1878 (D.D.C.) ("Field Aff."). Respondent was the first and remains the leading "public interest" law firm and information source in this field. Originally supported by foundation grants and contributions, respondent now supports its activities entirely with the revenues from its publications.

Respondent's weekly magazine, *Tax Notes*, publishes a wide range of opinions and scholarly analysis of major issues like President Bush's proposal to reduce taxes on capital gains, new I.R.C. § 89 requirements for employee benefit plans, tax policy changes in the offing, and taxes and the budget deficit.[1] It also publishes news of current developments in tax law and administration, including court decisions in tax cases. Field Aff. 1; *see Tax Notes*, Vol. 42, Nos. 7-10, Feb. 13, 20, 27, March 6, 1989. Respondent's board of directors and advisory board include two former Commissioners of Internal Revenue, high Treasury Department and Justice Department Tax Division officials from past Democratic and Republican administrations, leading economists (including one Nobel laureate), teachers and practitioners of tax law and accounting.[2]

Respondent has used the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to pursue its public education objectives and force government "secret law" into the public domain. Over vigorous government resistance, respondent has obtained disclosure of IRS' private letter rulings, IRS' internal legal opinions that embodied IRS' administrative law applied to taxpayers and the Treasury Department's files of communications with the Congress and others on tax policy issues.[3]

---

[1] "A scholarly article last month in *Tax Notes*, an authoritative weekly publication, concluded that the available data did not permit a definitive answer to the question of whether revenues would be increased or diminished by a lower capital gains rate." *Bush Likely to Ask Lower Capital Gains Tax*, N.Y. Times, January 31, 1989, A17.

[2] *See* Tax Analysts' letterhead, reproduced as Appendix II.

[3] *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974) (*see* 26 U.S.C. §6110); *Taxation With Representation Fund v. IRS*, 646 F.2d 666 (D.C. Cir. 1981); *Tax Analysts & Advocates v. Department of the Treasury*, C.A. No. 382-73 (D.D.C.). Respondent also sought, unsuccessfully in this Court, to challenge restrictions on legislative advocacy by nonprofit organizations. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). *See* T. Troyer & A. Lauber, *Supreme Court's TWR Decision Provides Guidance in 501(c)(3) Lobbying*, 59 J. Tax'n 66 (1983). Tax Analysts & Advocates and Taxation with Representation Fund are predecessor names of respondent. Taxation With Representation of Washington was an affiliate organization of respondent.

Respondent began its effort to remove the difficulties in timely obtaining and disseminating federal district court tax decisions in 1979 with an initial FOIA request to petitioner's Tax Division. Petitioner, counsel for the government in those cases, automatically receives the decisions as soon as they are issued. Petitioner persuaded respondent to withdraw its request in exchange for access to petitioner's weekly index of district court tax decisions. For five years respondent used the index and diligently sought to obtain copies of the listed decisions from the courts. Those efforts failed to obtain complete and timely access to the decisions. In 1984 respondent began making periodic formal FOIA requests to petitioner for copies of the decisions. Petitioner denied those requests and in 1985 respondent filed this suit. Pet. App. 21a-22a, 4a-5a.

For 10 years, at petitioner's request, respondent has used petitioner's weekly index to new district court decisions in efforts to obtain copies of them from the courts' clerks. With much difficulty and usually after considerable delay respondent has been able to obtain about 75% of them. The remaining 25%, about 470 decisions each year, are neither obtained nor published by respondent or any other publisher.[4]

---

[4] Pet. App. 2a n. 2, 6a n. 5; Field Aff. 4. The number of federal district court civil tax cases decided (*i.e.* "terminated by court action") in the fiscal year ending 6/30/84 was 2,199, in FYE 6/30/85, 1,958, in FYE 6/30/86, 1,658, in FYE 6/30/87, 1,685, *Reports of the Proceedings of the Judicial Conference of the United States*, 1984, 1985, 1986, 1987, Table C4, and in FYE 6/30/88, 1,810, Administrative Office of the United States Courts, *1988 Annual Report of the Director*, Appendix I, Table C5A (1988) (subtracting tax cases terminated by "no court action," 868, from total number of tax cases terminated, 2678). The average is 1,862. With 25% never reported, Pet.

The Records At Issue

Petitioner describes the district court decisions at issue here as if they are wholly alien to the work of its Tax Division, *i.e.* as papers merely "associated" with its litigation files, "under the exclusive control of the courts," which Tax Division attorneys "read" but "keep on hand simply for reference." Br. 8, 14, 21-22. The description does not do justice to the facts.

The decisions of federal district courts in tax cases are essential to the function, mission and operations of petitioner and its client, the Internal Revenue Service. Petitioner receives them during a litigation process in which the Tax Division and IRS are partners. U.S. Department of Justice, *The Attorney's Guide to the Organization and the Operation of the Tax Division* ("*Attorney's Guide*") 4.[5] The Tax Division handles for IRS such district court cases as taxpayer refund suits, IRS collection suits, criminal prosecutions, mandamus and injunction proceedings, declaratory judgment actions under § 7428 of the Internal Revenue Code and taxpayer challenges to jeopardy assessments. *Id.* 2-3.

The "association" between the documents and petitioner's "litigation files," Br. 14, is far from remote. As soon as petitioner receives a decision it is "copied and the original incoming document sent to the Department's official file ('DJ File'), in the particular case." Defendant's Answers to Plaintiff's First Set of Interrogatories, *Tax Analysts v. Department of Justice*, C.A. No. 85-1878 (Aug. 30, 1985) ("Def. Int. Ans.") 10.[6]

App. 2a n. 2, 6a n. 5, about 470 decisions go unreported annually, on average. Petitioner's reference to "20,000 civil tax cases *filed* each year," Brief for Petitioner ("Br.") 4 (emphasis added), not only includes "a substantial number" of Claims Court and state court cases, as petitioner admits, *id.*, but is an irrelevant figure; most cases "filed" never reach final judgment.

[5] "Although the Tax Division has responsibility for the litigation of tax cases, there is a considerable amount of coordination and collaboration between the Division and the Internal Revenue Service in the development of litigating strategies in the courts." *Id.* 4.

Tax Division receipt of a decision generates considerable activity. If the government has won the case, the Tax Division prepares and files a bill of costs. *Attorney's Guide* 66. If the decision awards a money judgment to the United States, the Tax Division is "responsible for collection." *Attorney's Guide* 65. If the government has lost and a refund is ordered, the Tax Division must ensure that the money is paid. *Attorney's Guide* 71. If the taxpayer seeks attorney's fees under 42 U.S.C. § 1988 (or 26 U.S.C. § 7430), the Tax Division defends. *Id.*

If the government has lost, the Tax Division also must consider filing a motion to alter or amend under Fed. R. Civ. P. 59., Def. Int. Ans. 6, 9, and must consider whether to recommend appeal. *Attorney's Guide* 67, 72. The recommendation process requires consideration and analysis of the district court decision not only in the Tax Division, but also by the IRS and the Solicitor General's office. The Tax Division sends a copy of the decision and other case file materials to the IRS for this purpose and to compute any refund due. *Attorney's Guide* 71; Def. Int. Ans. 10, 15, 16. The IRS' Office of Chief Counsel's Tax Litigation Division reviews the decision and prepares an appeal recommendation, styled an Action on Decision ("AOD"). *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 672-73 (D.C. Cir. 1981). The AOD also recommends whether or not IRS should "non-acquiesce," *i.e.* decline to apply the rule of the decision to other taxpayers. *Id.*

The AOD package (including the decision in issue) passes through the IRS hierarchy until a final recommendation is made. IRS relies on the AODs and the reasoning behind them as precedent in deal-

[6] Petitioner determines whether to keep or discard and in what manner to store these records. It has promulgated an elaborate scheme, in an Order 121 pages long, prescribing in exquisite detail the procedures to be followed in receiving, routing, transmitting and storing these among its other agency records. Department of Justice Order No. 2710.3A (December 9, 1980), reproduced as Exhibit C to Def. Int. Ans.; *see id.* pp. 6, 8, 9, 11, 14, 19-21, 67, 73.

ing with other taxpayers. *Id.* They are "widely disseminated" within IRS for use "in conferring with the public," and IRS' "no appeal" decisions "clearly pertain to the law that will be applied by the agency henceforth. . . ." *Id.* 684.

With IRS' appeal recommendation in hand, the Department of Justice completes its own recommendation process, in which the recommendation and the supporting documents (including copies of the decision) are circulated among several offices and from 10 to 15 attorneys in the Tax Division and the Solicitor General's office. Def. Int. Ans. 11, 18-19. If the Solicitor General approves an appeal, the Tax Division prepares the record for transmission to the Court of Appeals and the joint appendix. *Id.* 67-68. Both must contain a copy of the decision. Whatever the appeal decision is, district court decisions are necessarily involved in the Tax Division's determination of litigation strategy, policy and tactics in concert with IRS. *Id.* 21-22.

Petitioner has 60 days to appeal tax (as all other federal government) cases. Sometimes a case is appealed before respondent or any other publisher, using petitioner's index and pursuing decisions in the 90-odd district courts, can obtain a copy of the decision and disseminate it. Relenting from its blanket policy of refusal, in such cases petitioner will, on its own motion (but two months or more after the decision came down), provide a copy of the district court decision to respondent. Field Aff. 5; *id.* App. A; Def. Int. Ans. 30.

Effects of Current Practice

Petitioner and its client, the IRS, "rely" on district court decisions, as precedents, "to obtain guidance on the probable disposition of other, similar cases in the future." Br. 17. They rely on the decisions in "deciding whether to appeal an adverse decision, deciding litigation positions and strategy and framing legal arguments." Pet. App. 17a (quoting petitioner's Answer to the complaint in this action). "The opinions of the courts tell the agency how it may act. . . ." Br. 18.

As the government counsel in all federal district court tax cases, petitioner's Tax Division receives copies of the decisions immediately. But respondent has found it "impossible" to secure and publish "the tax decisions rendered by the ninety-odd, far flung federal district courts from their clerk's offices on any timely or regular basis. . . ." Pet. App. 4a. About 25% are published by no one, p. 3, *supra*. Thus the members of the taxpaying public, their attorneys, accountants, tax planners and tax preparers are denied complete, timely and contemporaneous access to a body of law: the nearly 1900 tax decisions the district courts issue each year.

Government possession of precedents that the government's adversaries in other cases get only late, if ever, gives the government an advantage unintended by the courts and at odds with our adversary system. It gives the government an advantage over litigants in pending cases that involve issues similar to those decided in cases whose decisions petitioner receives, and over taxpayers contesting similar issues in the IRS administrative process.

Petitioner's Claims of Cost

Petitioner charges respondent with "commercial motivation," with seeking "a taxpayer-subsidized source of records that" it "can obtain elsewhere," and with abusing FOIA to impose "enormous" costs on the taxpayer. Petitioner predicts "crushing" difficulties from a horde of "commercial publishers and law firms." Br. 20, 29-30; Pet. for Cert. 7, 18-20; *see* Pet. App. 11a-14a.

There is no substance to these claims. As the court of appeals wrote,

> [t]his is not ... a case in which a commercial publisher is seeking to shift its operating costs to federal taxpayers but rather one in which existing government machinery is being used to enhance the efficiency of a privately provided public service, ensuring prompt public access to federal court decisions. Such a result is not at odds with the goals of the FOIA.

Pet. App. 12a n. 13.

Moreover, petitioner's release of district court tax decisions would save respondent no more than the difference between the clerks' per-page copying charge and petitioner's. Indeed, under 5 U.S.C.

§ 552(a)(4)(A)(vi) petitioner may well be authorized to charge the same amount per page as do the clerks, *see* Br. 30.[7] On the other hand, the feared burden of compliance is a creature of fairy tale. As the court of appeals suggested:

> Compliance with the request for access to such decisions could involve no more than a memorandum to tax attorneys telling them to make an extra copy of district court decisions as they receive them and route such copies to a central file to which the plaintiffs would have access. No file searches need be involved at all.
>
> Thus our decision that district court opinions qualifying as "agency records" cannot be withheld means only that extra copies of these decisions must be made available in an agency reading room.

Pet. App. 12a-13a (footnotes omitted).

SUMMARY OF ARGUMENT

Petitioner argues that its copies of the decisions are neither "agency records" within the compass of FOIA nor are they "improperly withheld" so as to justify judicial relief to compel disclosure. Both arguments are plainly wrong. They are rationales for petitioner's antipathy to change its practices even slightly to comply with its duties under FOIA, duties that it asked Congress to relieve it of, a request the Congress refused.

Petitioner argues that its copies of judicial decisions are not agency records because — and only because — the originals are court records. Yet petitioner admits that some court records are agency records. Petitioner's possession, control and use of these court-

---

[7]In the Court of Appeals respondent stated that it is willing to continue to use petitioner's weekly log, continue to seek copies of the decisions from the district courts' clerks' offices by telephone and mail, paying the fees charged by the clerks (as well as bearing the expense of the process). It would request from petitioner only those decisions, approximately 25% of the universe, about 470 per year, *see* p. 3 n. 4 *supra*, that it cannot obtain from the district court clerks by these efforts. Pet. App. 6a n. 5.

originated documents satisfy every element of this Court's holdings on what makes a document an agency record.

Petitioner's Tax Division receives the documents in the course of carrying out its functions as counsel for the government in federal district court tax cases. It uses them in numerous ways: in deciding whether the decision, if adverse, should be appealed or if not appealed how it must be obeyed; as precedents in shaping its positions, litigation strategy and advice to IRS in, and to predict the probable outcome of, other cases. Petitioner carefully incorporates one copy of each decision into its official, permanent "DJ" litigation file.

Petitioner also transmits a copy to its client, IRS, where more copies are made, distributed and used by IRS personnel to carry out IRS' functions. IRS also must decide whether it wants to appeal adverse decisions. If not, and if money therefore is due the plaintiff taxpayer, IRS must analyze the decision to compute how much is due and decide whether to adopt the decision as a correct interpretation of the Internal Revenue Code, or to reject it and issue an "Action on Decision" announcing its disagreement, or "nonacquiescence."

Thus petitioner has "received" the documents, "possesses" them, "preserves" them "in the performance of its functions" and in every possible sense of the word, "controls" them. *Forsham v. Harris*, 445 U.S. 169, 182-85 (1980). It incorporates them into its files and uses them for numerous purposes. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-52 (1980). The documents are "agency records" under the tests established in those cases.

Prompt public access to the documents after petitioner and IRS receive them is practicable only from petitioner and through the FOIA. Such public access is indispensable to public knowledge and understanding of the various agency functions that receipt of a decision trigger and to the public assessment of their performance. It also is indispensable to create an even playing field for the government and taxpayers, unlike the present one where the government often learns about changes in the rules considerably before the taxpayer.

Petitioner does not argue that any provision of the statute authorizes it to withhold the records at issue. Yet the statute, specifically 5 U.S.C. § 552(d), FOIA's legislative history and numerous decisions of this Court[8] make it clear beyond doubt that the only withholding that is not "improper" is a withholding expressly authorized by one of the Act's nine specific exemptions. Nor is this case like *GTE Sylvania v. Consumers Union of the United States*, 445 U.S. 375 (1980), on which petitioner heavily relies, where a court order barred the agency from disclosure.

Aware of this, between 1981 and 1986, and beginning soon after respondent first requested district court opinions from petitioner under the FOIA, petitioner sought to persuade Congress to amend the FOIA expressly to permit withholding of court records. The Congress declined, because, it found, some "court records ... are not readily accessible except through the government." S. Rep. No. 221, Freedom of Information Reform Act, 98th Cong., 1st Sess 20 (1983).

Petitioner's withholding of the documents is unjustified; it is the kind of needless denial condemned in *GTE Sylvania*, 445 U.S. at 385-86. Petitioner has the burden of establishing that the documents are exempt from disclosure. 5 U.S.C. § 552(a)(4)(B); *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 352 (1979). Petitioner's weak plea of inconvenience and plainly transparent assertions of cost (as the court of appeals saw, Pet. App. 12a-13a nn. 13-15) fail to sustain that burden on any ground, much less under any language in the statute. Petitioner's withholding here is plainly improper.

[8] *United States Dep't of Justice v. Julian*, 108 S.Ct. 1606, 1611 (1988) and other cases collected at Appendix ("App.") I to this brief.

ARGUMENT

I. The Records Are Agency Records That Petitioner Obtains, Receives, Possesses, Keeps, Uses and and Controls.

Twice the Court has faced the "agency records" issue. In *Forsham v. Harris*, 445 U.S. 169 (1980), the records (consultant's files) had never been "obtained" by the agency. In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), one set of records, created by a non-agency (Dr. Kissinger while he was only National Security Advisor), had been stored at the agency and then removed from the agency's possession. 445 U.S. at 143, 155-56. Others had been created by the agency (Dr. Kissinger while he was Secretary of State) and then removed. *Id.* at 146-47, 154-55.

In *Forsham* the Court held that the records were not "agency records" within the compass of FOIA. For records to be agency records there must be "some relationship" between the agency and the records. 445 U.S. at 178. The agency must "obtain" the record, and it must be a "record" within the definition of the Federal Records Act — a "paper ... *received* by an agency ... in connection with the transaction of public business," 445 U.S. at 182, 183 (emphasis is the Court's). In adopting this definition the *Forsham* Court relied on and cited the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967) as confirming Congress' intention to import the Records Act definition into FOIA. *Id.* 183. The 1967 memorandum expressly defined agency records, the records covered by what is now 5 U.S.C. § 552(a)(3), as "records in being and in the possession *or* control of an agency." *1967 Attorney General's Memorandum* at 23 (emphasis added).

In *Kissinger* the Court adopted that same definition, holding that "agency possession or control" of a document "is prerequisite to triggering ... duties under the FOIA," which "ensure[s] 'access to the information *possessed* by [Government] servants.' " *Kissinger*, 445 U.S. at 151 (emphasis is the Court's). FOIA "require[s] agencies to disclose those 'agency records' for which they have

chosen to retain possession or control." *Id.* (footnote omitted). But mere "physical location" at an agency is not enough. *Id.* 157. The Act does not cover documents that "never entered the [agency's] files" and "were not used by the [agency] for any purpose." *Id.*

Here petitioner admits and the record establishes that the Tax Division has "obtained" the documents at issue, that it "received" them "in connection with the transaction of public business" (federal tax litigation), that it has "possessed" the documents from the time it received them, that it has "chosen to retain possession," that the documents have been incorporated in its permanent litigation files and that it has "used" them for several purposes. Under the tests this Court developed in *Forsham* and *Kissinger*, the documents are agency records.

Petitioner argues, however, that the courts, not the Tax Division, "control" the records at issue, Br. 8; *see Kissinger*, 445 F.2d at 151-52. Petitioner then explains that it means that petitioner does not control the "content" of judicial decisions nor does it "control" what the courts do with the original of the document and copies in the possession of the courts, their judges, clerks and other personnel.[9] Br. 14. But petitioner's long set of variations on this theme, Br. 13-20, is a giant irrelevancy, as the Court of Appeals pointed out, Pet. App. 16a; *see* Br. 18. Petitioner indeed does control the copy it receives pursuant to its duty and function as counsel for the government in tax cases. It controls all the copies it makes. It files and preserves its original copy and makes more copies because it needs to preserve and use the records in order properly to perform its duties and functions "in those or other cases," Br. 19.

Petitioner admits that some records, presentence reports, do "qualify as records of both the courts and Executive Branch agencies," i.e. of petitioner itself. Br. 12.[10] The same factors that forced petitioner to that concession for presentence reports in *Crooker v. United States Parole Comm'n*, 469 U.S. 926 (1984), apply to copies of district court decisions in petitioner's hands, as described at pp. 4-6, *supra*. As in *Crooker*, here the courts claim no authority and impose no special restraints on petitioner's use or disclosure of court decisions. *Crooker*, No. 83-2082 (October Term, 1984), Brief for the Respondent in Opposition at 15. As in *Crooker*, here the courts' clerks may not decline to furnish a copy of a decision to petitioner "and the court has no authority to prevent him from doing so." *Id.* 10. As in *Crooker*, here petitioner has no duty to return the decision to the court when it has finished using it. "Instead the [petitioner's] copy ... is routinely sent to the Department of Justice's records center." *Id.* As in *Crooker*, here petitioner must and does "consider" the decision, *id.*, in making the appeal decisions in that case and strategy decisions in other cases. For court decisions here, as for presentence reports in *Crooker*, "an agency's receipt, possession, and official use of a document in this manner would lead to the conclusion that the document in question is an 'agency record.' " *Id.* 11.

As one court of appeals holds, "[t]he purpose of the Act" was "to give the public access to information on which the government bases action," and that purpose "would be impeded if 'agency record' excluded documents that had moved the government to act." *General Electric Co. v. United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1400 (7th Cir. 1984).

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[9]No more, of course, than an agency controls the "content" of any document it does not create, like petitioner's copies of this brief. But agency records include documents agencies receive or obtain, as well as documents agencies create. *Forsham*, 445 U.S. at 182.

[10]It took more than 20 years of litigation beginning with *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968), about a dozen court of appeals decisions on both sides of the issue, a confession of error by the Solicitor General in *Crooker v. United States Parole Comm'n*, 469 U.S. 926 (1984), and finally the decision of this Court in *United States Dep't of Justice v. Julian*, App. I p. 8a, for petitioner to come to this concession. *See* Pet. App. 15a-17a and id. n. 17; Pet. for Cert. 15-17; Respondent's Brief in Opposition to Pet. for Cert. 6-8, to which we refer the Court for our response to petitioner's argument based on *Warth v. Department of Justice*, 595 F.2d 521 (9th Cir. 1979), Br. 12-14.

Here, nothing could be more obvious than that the receipt of a district court tax case decision moves the government, *i.e.* both petitioner and its client the IRS, to act. If the decision is wholly favorable to the government's position, it influences petitioner's posture in pending cases if only to reinforce it, and encourages IRS in its determination to apply to other taxpayers the rule it urged in the case just decided. If unfavorable, it may lead to change in petitioner's arguments in pending actions or IRS' position vis-a-vis other taxpayers. If unfavorable, it also requires a decision by IRS and petitioner whether or not to appeal and a decision by IRS whether to "non-acquiesce." If appealed, it "moves" petitioner and IRS to decide how, in the interim, to argue pending cases and treat taxpayer controversies still in IRS' administrative adjudication process.

Thus the relationship of the district court decisions at issue here to the purpose of the FOIA " 'to open agency action to the light of public scrutiny,' " *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, No. 87-1379 (March 22, 1989), slip op. at 22, *quoting Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), is close indeed; *see* pp. 4-7, 9 *supra*. The facts here fall squarely within the Court's teaching in that case.

In *Reporters Committee* the Court established standards for the balancing, required by FOIA Exemption 7(C), of an individual's privacy interest in law enforcement records against the public's interest in disclosure. Slip op. at 5-6, 12. It held that the public's interest under Exemption 7(C) turned on whether the requested information would shed light on the activities of the government, *id.* 22-25, because "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within" FOIA's purpose to protect and promote "the citizens' right to be informed about 'what their government is up to'." *Id.* 23, quoting *Environmental Protection Agency v. Mink*, 410 U.S. 73, 105 (1973) (dissenting opinion). That purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but reveals little or nothing about an agency's own conduct." *Id.*

Petitioner makes an argument here that would import into the definition of "agency records" the *Reporters Committee* definition of the public interest for Exemption 7(C) purposes. It contends that its copies of federal district court tax decisions are not agency records because they do not "reveal anything about the operations and decisions of an 'agency'," Br. 8, nor "enable the public to know what agencies . . . are doing," *id.* 18.

Of course, this case presents no countervailing interest protected by the statute, as personal privacy is protected by Exemptions 6 and 7(C); *see* pp. 15-24 *infra; Reporters Committee*, slip op. at 4-5; Br. 26-27 n.11. But even if the Court's definition of the public interest for Exemption 7(C) purposes were applied to "agency records," that test is satisfied here.

Copies of court decisions, circulating prolifically around and between the Tax Division and IRS, are the essential documentary base for a myriad of agency activities, *see* pp. 4-7 *supra*. Their availability to the public as soon as possible after petitioner's Tax Division receives its copies and the various processes described above begin will reveal much about agency operations and decisions, Br. 8, and will enable the public to know what petitioner and the IRS are doing, Br. 18. As petitioner admits, these court decisions "tell the agency how it may act," *id.*

Hence the prompt public availability of district court decisions from petitioner under FOIA will provide "a means of finding out about the operations of government." A. Scalia, *The Freedom of Information Act Has No Clothes*, Regulation, March/April 1982, at 16. Their prompt public availability from petitioner under FOIA will shed light on both petitioner's and the IRS' performance of their "statutory duties," and will serve "citizens' right to be informed" about what the government's lawyers and the IRS are "up to" in matters that directly concern them as taxpayers and tax litigants, *cf. Reporters Committee*, slip op. at 23.

II. Petitioner Has Improperly Withheld The Records.

Petitioner argues that it has not "improperly withheld" the court decisions at issue here because they are available from the district

courts' clerks' offices. Br. 22-30. Petitioner declared in 1967 that the FOIA "leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act." *1967 Attorney General's Memorandum* at iii. The statement was and still is correct. The language of FOIA, the legislative history of the original act and of subsequent amendments and this Court's consistent interpretations of the Act lead to but one conclusion. The only kind of voluntary withholding of agency records requested by a member of the public that is not "improper" is a withholding pursuant to one of FOIA's nine specific exemptions, 5 U.S.C. §552(b)(1)-(9).[11]

A. The Statute Is Clear.

FOIA provides very simply, in a passage that must be quoted thousands of times in FOIA decisions:

> This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.

5 U.S.C. § 552(d). It also provides, in language that petitioner omits from its recitation of Statutory Provisions Involved, Br. 2-3, that in FOIA actions like this "the burden is on the agency to sustain its action," § 552(a)(4)(B).

Language could hardly be clearer. For a withholding not to be "improper," the reasons for withholding must be found within the four corners of the Act, and the agency bears the burden of establishing that the statute does not require disclosure. *Federal Open Market Committee*, 443 U.S. at 352; *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973). There is no room for administrative or judicial invention of new reasons to justify an agency's refusal to produce one of its records.

Therefore, if

[11]That is, a withholding not pursuant to the peremptory command of a court, as in *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. at 386. *GTE* establishes the only lawful excuse for withholding outside the statute.

— a requester reasonably describes the record, 5 U.S.C. § 552(a)(3),

— follows the agency's published rules, *id.*,

— is willing to pay the fees, *id.*,

— the records are not already published in the Federal Register, available from the agency by purchase or made generally available (*e.g.* in the agency's public reading room) for inspection and copying, §552(a)(2), and

— the agency has no colorable claim of exemption under § 552(b)(1)-(9),

Then

— the agency must produce the record, refusal to do so is improper withholding, and the requester is entitled to judicial relief, *i.e.* a federal court order to the agency to produce the record.

B. The Legislative History Is Clear.

Rarely has the intent of Congress been made plainer in the legislative history of a statute than it has for the FOIA. It is that, as §552(d) expressly declares, agencies must disclose all their records unless a specific record is exempt under one of FOIA's nine exemptions.

The FOIA was enacted to reverse years of practice under Section 3 of the Administrative Procedure Act, to eliminate numerous agency excuses for refusing to disclose records to the public and "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language" S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, 93rd Cong., 2nd Sess. 38 (1974) (hereafter cited as "1974 Source Book"). FOIA "requir[es] the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions." H. R. Rep. No. 1497, 89th Cong., 2nd Sess. 1 (1966), 1974 Source Book 22.

The Act had "the general objective of enabling the public readily to gain access to the information necessary to deal effectively and

upon equal footing with Federal agencies." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), 1974 Source Book 43. Moreover, "[t]he purpose of" what is now § 552(d) was "to make clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in" what is now §552(b). S. Rep. No. 813 at 10, 1974 Source Book 45 (emphasis in original); *see also* H. R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966), 1974 Source Book 32. It was this "expressed . . . intent" that the principal sponsor of FOIA in the House, Rep. Moss, stated "we hope the courts will read with great care." 1974 Source Book 48.

In enacting the 1974 amendments to the FOIA, Congress repeated its specific understanding and intent that the only exemptions "to the general rule of mandatory disclosure" are the nine listed in § 552(b), and that "the FOIA authorizes only the withholding 'specifically stated....' " S. Rep. No. 854, 93rd Cong., 2nd Sess. 5, 6 (1974), *reprinted in* Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents, 94th Cong., 1st Sess. 157-58 (1975). A few years later, Congress dealt specifically with the question of disclosure of court records and made it clear that FOIA required agencies to disclose them.

In 1981 petitioner proposed to Congress amendments that would have provided "that an agency would not have to produce requested material that consists of ... court records ... ." The stated purpose of the proposal was to "free agencies from having to disclose information that is already publicly available."[12]

[12]Hearings Before the Subcommittee on the Constitution, Senate Judiciary Committee on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751, July 15, 22, 31, Sept. 24, Oct. 15, Nov. 12, and Dec. 9, 1981, 97th Cong., 1st Sess. at 638, 641-42, 655, 660 (1981). The two bills introduced in the Senate at petitioner's behest, S. 1730 and S. 1751, 97th Cong., 1st Sess. (1981), would have amended FOIA to provide, in pertinent part,

> In any case in which a portion of the records requested under this subsection consist of ... court records ... the agency shall not be required to copy that portion of the record but may identify such portions by date and source.

S. 1730 § 4(7).

As Senator Hatch, then Chairman of the Senate Judiciary Committee and sponsor of the proposed amendments, explained,

> agencies are often burdened by requests for information that is publicly available in newspaper accounts or court records.
>
> The bill would allow the agency to refer the requester to those public records without putting him or the agency to the expense of duplicating such records.

Hearings, p. 18 n. 12 *supra*, at 628.

Prompted by the Department of Justice's urgings, "the Senate Judiciary Committee undertook the most exhaustive examination of the Freedom of Information Act (FOIA) in its history." It "held nine hearings and entertained over sixty expert witnesses with the goal of drafting a bill that will improve the Act without compromising its mission of providing our citizenry with a tool to learn about federal government activities." S. Rep. 221, Freedom of Information Reform Act, 98th Cong., 1st Sess. 1 (1983); *see id.* at 3-6 for a detailed chronology of Congress' deliberations.

This extensive consideration resulted in Congress' refusal to absolve agencies from having to provide court records to requesters.[13] Congress' reason was the very problem that caused respondent to file this case: "the concern that some public records (*e.g.*, *court*

or

> An agency is not required to disclose any material requested under this subsection which consists of ... court records, ... but the agency shall inform the requester of the nature of such public source materials.

S. 1751 § 2(7).

[13]The 1986 amendments as finally adopted in the Anti-Drug Abuse Act of 1986, P.L. 99-570 §§ 1801-04, 100 Stat. 3207-48 (1986), included new provisions for establishing and waiving of search and copying fees, 5 U.S.C. § 552(a)(4)(A)(i)-(vii), and amendments to FOIA Exemption 7 (law enforcement records), *id.* § 552(b), [new] (c). That Congress was willing to give agencies some flexibility in recovering costs of complying with the FOIA, but was unwilling to relieve agencies of the duty of producing materials possibly available elsewhere, including court records, ought to dispose of petitioner's arguments here altogether.

records and even some newspapers and magazines) *are not readily accessible except through the government* . . . ." *Id.* (emphasis added).

The procedure petitioner has followed with respondent until now, and which it wishes to preserve, is to release a weekly index of decisions while refusing to produce copies of the decisions themselves. Br. 27 n.11. In claiming that it has "furnished respondent all of the information it should need to obtain the records it seeks from the" courts, Br. 24, petitioner is operating as if Congress had enacted, not rejected, the FOIA amendments it proposed in 1981 (and which, perhaps not coincidentally, it proposed after respondent's first request, in 1979, for the records at issue here, see p. 3 *supra*).

Congress' consideration and express rejection of petitioner's proposal to substitute an index for requested court records demonstrate that Congress intends, and that petitioner knows that Congress intends, the FOIA to require agencies to produce to requesters court-issued documents like decisions. Congress' "action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corporation v. Copp Paving Co., Inc.* 419 U.S. 186, 200 (1974). Here there is "evidence of a congressional intent" to require disclosure of court records by agencies, like petitioner, that hold them. *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, slip op. at 15; *see id.* 3, 17. [14] Petitioner thus is simply wrong in asserting that "Congress did not intend FOIA to be used to obtain publicly available court-issued materials that can be obtained from the courts," Br. 9.[15]

[14] *See also Southwestern Ry. v. Morgan*, 108 S.Ct. 1837, 1844 n. 8 (1988); *Landers v. National R.R. Passengers Corp.*, 108 S.Ct. 1440, 1442 (1988); *Norwest Bank Worthington v. Ahlers*, 108 S.Ct. 963, 968 (1988); *Burlington Northern R.R. Co. v. Brotherhood of Maintenance Way Employees*, 107 S.Ct. 1841, 1848 (1987); *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 13 n. 7 (1983); *Baldrige v. Shapiro*, 445 U.S. 345, 358 (1982) (FOIA case; Court applied doctrine to Exemption 3 statute); *Dames & Moore v. Regan*, 453 U.S. 654, 685-86 (1981).

[15] Or that "[t]he legislative history of FOIA shows that Congress was not concerned about convenient access to public judicial opinions and orders." Br. 14.

We agree with petitioner that this Court should "seiz[e] every thing from which aid can be derived" in order "to discover the design of" Congress, Br. 30, quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Congress' design is easy to discover. It intended and intends the FOIA to cover court records because, like those at issue here, they are not "readily accessible" except through the Department of Justice. It does not intend the FOIA to let petitioner continue to substitute an index for the actual court records respondent has requested.

C. This Court's Opinions Are Clear.

This Court's numerous expressions of the plain intent and reach of FOIA are collected in Appendix I.[16] From the Court's first occasion to discuss the Act in *Environmental Protection Agency v. Mink*, App. I p. 1a, to its most recent in *United States Dep't. of Justice v. Julian*, App. I p. 8a, there has been not a single hint, much less expression, to the contrary. Thus this Court declared in 1973:

— the nine exemptions "are explicitly made exclusive ... and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." Congress has already balanced the competing interests between disclosure and secrecy: "the Act ...[,] broadly conceived ... seeks to permit access to official information long shielded unnecessarily from public view" and the exemptions "represent[ ] the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Mink*, App. I p. 1a, quoted in *Chrysler Corp. v. Brown*, 441 U.S. at 290 n. 9; *Department of the Air Force v. Rose*, 425 U.S. at 361-62, and *Administrator, Federal Aviation Administration v. Robertson*, App. I p. 2a.

In 1975:

— "As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless

[16] Appendix I contains extensive quotation and complete citation.

it falls within one of the Act's nine exemptions...." *Sears*, App. I p. 2a.

In 1976:

> To make crystal clear the congressional objective ... Congress provided in § 552(c) that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated...." [The nine] exemptions from compelled disclosure ....set forth in § 552(b)....do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.

Rose, App. I p. 3a, quoted in *Chrysler*, 441 U.S. at 290 n. 10.

In 1978:

— "[U]nless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." *NLRB v. Robbins*, App. I p. 4a.

In 1979:

> ... [T]he purpose of the FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." The Act makes available to any person all agency records....It then defines nine specific categories of records to which the Act "does not apply". . . . ***The burden in any such proceeding [action to compel disclosure] is on the agency to establish that the requested information is exempt.***"

Federal Open Market Committee of the Federal Reserve System v. Merrill, App. I p. 5a (emphasis added).

In 1982:

— "The Freedom of Information Act sets forth a policy of broad disclosure of Government documents....and [Congress] provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, App. I p. 6a.

> Once having completed the arduous and demanding task of balancing interests, and having recorded the results in the nine enumerated exemptions from the FOIA, Congress then attempted to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the "availability of records to the public" is not limited, "except as *specifically* stated."

Id., dissenting opinion of O'Connor, J., App. I p. 7a. (emphasis in original).

In 1988:

— "A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in §552(b). . . . [W]e have consistently stated that FOIA exemptions are to be narrowly construed." *Julian*, App. I p. 8a.

Against this array, petitioner relies mainly on *GTE Sylvania, Inc. v. Consumers Union of the United States*. It argues that *GTE* means that withholding is "improper" only if the withholding is intended to conceal agency misconduct. *See* Br. 9, 23-24, 31. Petitioner ignores the narrow issue in *GTE*: whether a withholding, not justified by one of the nine FOIA § 552(b) exemptions, was nevertheless not improper "when the agency holding the material has been enjoined from disclosing it by a federal district court." *GTE*, 445 U.S. at 377.

In answering that question "yes," this Court did not create a general charter for non-disclosure. The FOIA did not compel disclosure in *GTE* because the court orders enjoining disclosure meant that there was "simply ... no discretion for the agency to exercise." *Id.* at 386. The agency had made no effort to avoid disclosure; "indeed," there, unlike this case, it was not the agency's "decision to withhold the documents at all," *id.*

Petitioner recognizes, Br. 9, that the Court used the phrase "unjustified suppression" to cover not only conscious effort "to hide mistakes or irregularities," but also "***needless*** denials of information," *GTE* at 385 (emphasis added). "[U]njustified suppression" included all denials of "requests for documents without an adequate basis for nondisclosure." *Id.* Any such denial was "improper[ ],"

"wrongful[ ]" or "unjustified." *Id.* at 385-86. Among the examples the Court cited as "unjustified suppression" were two involving just such "needless denials" of routine information, not implicating any "irregularities" or "mistakes": agencies' refusals "to release telephone directories" and "the names of postal employees." *Id.* at 385.[17]

Petitioner's reasons for withholding here do not include a contrary court order. They are, it is said, cost, administrative inconvenience and unsupported assertions about respondent's motive. Br. 4, 11, 20, 22, 29. No court has ever accepted anything of the sort as a valid basis for withholding. *Sears v. Gottschalk*, 502 F.2d 122, 126 (4th Cir. 1974), *cert. denied sub nom. Sears v. Dann*, 422 U.S. 1056 (1975); *Ferguson v. Kelly*, 455 F.Supp. 324, 326 (N.D. Ill. 1978); *see also Long v. United States Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). Nor do petitioner's asserted reasons have any basis in the record or in fact, *see* pp. 1-4, 7-8, *supra*, 24-25 *infra*.[18]

III. Petitioner Musters No Authority, Reason or Equity for the Result It Urges.

With no support in the decisions of this Court, petitioner retreats to suggesting that courts have some general equitable discretion to decline to order disclosure of records that do not fall within one

[17]The Court found these examples in H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, 1974 Source Book 26-27; *GTE*, 445 U.S. at 385. Another example in the House Report (at *id.)* was an agency's refusal to publish its rules and a description of its organization and operations. Congress distinguished between such "needless" denials and those denials intended "to hide mistakes" from "public scrutiny." *GTE*, 445 U.S. at 385; H. R. Rep. No. 1497 at 6. Both kinds were "improper." H. R. Rep. No. 1497 at 5.

[18]Petitioner's arguments from *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 86 (2nd Cir. 1979), *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976), and *City of West Chicago v. NRC*, 547 F.Supp. 740, 749 (N.D. Ill. 1982), Br. 27-29, are sufficiently disposed of in the Court of Appeals' opinion, Pet. App. 8a-10a.

of the nine exemptions but which agencies think it inconvenient to produce. *See* Br. 25 n. 9. This Court has laid this ghost to rest, not once but many times. *See Rose*, 425 U.S. at 360-61, citing what is now § 552(d); *Robbins*, 437 U.S. at 220-21, 223; *Abramson*, 456 U.S. at 621; *Julian*, 108 S.Ct. at 1611.

The cases petitioner cites have no relevance. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), the plaintiffs had invoked the courts' traditional equitable jurisdiction to enforce statutory regulatory requirements (obtaining a permit in *Weinberger*; hearing and determination procedures in *Amoco*). Neither statute included directory language like § 552(d)'s. FOIA cases do not require resort to general equity jurisdiction to compel disclosure. 5 U.S.C. § 552(a)(4)(B). The FOIA spells out the court's jurisdiction and power "to order the production of ... agency records." In *Renegotiation Board v. Bannercraft Corp.*, 415 U.S. 1, (1974), the issue was a court's equitable power to enjoin a different agency proceeding while the plaintiffs' FOIA requests were *sub judice*, not equitable discretion to avoid FOIA's express command itself. *See Freuhauf Corp. v. IRS*, 522 F.2d 284 (6th Cir. 1975).

Moreover, Congress has made plain that the FOIA admits no such exercise of equitable discretion. H. R. Rep. No. 1419, 1975 Source Book 84:

> Finally, some courts have decided for themselves that it is discretionary with them whether they order the production of information which is held not to be subject to the exemptions permitted by subsection (b) of the FOI Act. In effect, they are applying theories of equity to balance the need of the individual citizen to the information requested under the act and the need of the Government to withhold such information. Information requested under the act by the plaintiff should be considered only with respect to whether or not the Government's arguments fulfill the "burden of proof" requirement that the information is subject to the subsection (b) exemptions claimed. If the court finds that the Government has not

> met such test, the information should be ordered to be made promptly available to the plaintiff solely on the substantive merits of the case.

Even petitioner claims only that the equitable discretion argument "should be advanced in court only under strongly compelling circumstances." U.S. Department of Justice, Office of Legal Policy, *Freedom of Information Case List, Justice Department Guide to the Freedom of Information Act* 478 (Sept. 1988). Strongly compelling circumstances are absent here. If anything, the equities weigh heavily for respondent. *See* pp. 6-8, 14, *supra*.

Petitioner's claim of cost and burden are chimerical; pp. 7-8, *supra*. At present petitioner and its client IRS have an advantage over taxpayers in the courts and the administrative process. The government knows well before the public what the district courts have held on tax law issues and in one fourth of the cases the public never learns.

It is understandable that the government may not wish to lose this advantage and place the public on an "equal footing," H. R. Rep. No. 1497, p. 18, *supra*. That is not a principled reason for this Court to approve the withholding of records of such importance, even if the government's action is only greatly to impede or delay, not altogether to prevent the public from obtaining access to a body of tax law. "Secret law is an abomination," *Cox v. United States Dep't. of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978), *quoting* K. Davis, *Administrative Law Treatise* 137 (Supp. 1970); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975); *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, slip op. at 22 n. 20. Law that is only partially or temporarily secret may be less of an abomination, but it is *pro tanto* an abomination nonetheless. Prompt disclosure of decisions, possible only from petitioner under the FOIA, will to that extent "reveal ... 'secret law' followed by an agency." Br. 14.

If petitioner's concern is truly one of cost and not a hidden wish to preserve the status quo for strategic reasons, then its concern should be addressed not to this Court but to the Congress, as it

did in 1981, *see* pp. 18-20, *supra*, and again less than a year ago.[19] As the Court of Appeals recommended: "[i]f compliance with the FOIA, despite its provision for the payment of costs, takes on nightmarish qualities for agencies, congressional adjustments to the law are their own [sic; in the printed report of the decision, 845 F.2d 1060, 1067 n. 16, the word is "only"] answer." Pet. App. 13a n. 16.

Petitioner's argument boils down to this — "there is simply no good reason" to construe FOIA to cover the copies of court decisions in petitioner's possession and control. Br. 15. But petitioner must do better than that. FOIA expressly puts the "burden" on the agency desiring to withhold records "to sustain its action," 5 U.S.C. § 552(a)(4)(B), "to establish that the requested information is exempt." *Federal Open Market Committee of the Federal Reserve System v. Merrill*, App. I p. 5a; *Environmental Protection Agency v. Mink*, App. I p. 1a.

Respondent does not have the burden of establishing a "good reason" for disclosure. Rather, petitioner has the burden of establishing a "good reason" for withholding. In this petitioner fails. Congress has struck the balance between what must be disclosed under FOIA and what may lawfully be withheld. At petitioner's urging, Congress has given agencies some of the discretion they sought to impose costs on requesters; *see* 5 U.S.C. § 552(a)(4)(A); U.S.

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[19]Statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Before the Subcommittee on Technology and the Law, Senate Judiciary Committee, Concerning the Freedom of Information Act at 6 (August 2, 1988); where the Department of Justice also described the decision below in this case as a horrible example of FOIA gone awry and of what petitioner sees as the excessive cost of FOIA, *id.* at 17-19, which it estimated as $70 million per year. But "we spend nearly $100 million annually on military bands." P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 Emory L. J. 649, 665 (1984). The point is that the courts are neither equipped nor empowered to make decisions about what costs the government should bear; such matters should and must be left to the Congress.

Department of Justice, *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act*, App. II (December 1987). Its request for relief here is addressed to the wrong branch.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX I

Environmental Protection Agency v. Mink, 410 U.S. 73, 79, 80 (1973) (citations omitted) (Opinion of the Court by White, J.):

The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in distrct courts, where "the court shall determine the matter de novo and the burden is on the agency to sustain its action." Noncompliance with court orders may be punished by contempt.

* * *

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136, 137 (1975) (citations omitted) (Opinion of the Court by White, J.):

The Act's background and its principal objectives are described in *EPA v. Mink*, and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. . . . Finally, and more comprehensively, all "identifiable records" must be made available to a member of the public on demand. The Act expressly states, however, that the disclosure obligation "does not apply" to those documents described in the nine enumerated exempt categories listed in § 552(b).

Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255, 262 (1975) (citations omitted) (Opinion of the Court by Burger, C.J.):

Because it considered the public disclosure section of the Administrative Procedure Act inadequate, Congress sought to permit access to certain kinds of official information which it thought had unnecessarily been withheld and, by the creation of nine explicitly exclusive exemptions, to provide a more workable and balanced formula that would make available information that ought to be public and, at the same time, protect certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure. The exemptions provided by the Act, one of which we deal with here, represent the congressional judgment as to certain kinds of "information that the Executive Branch must have the option to keep confidential, if it so chooses." [quoting ***Mink***].

Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (citations omitted) (Opinion of the Court by Brennan, J.):

Our discussion may conveniently begin by again emphasizing the basic thrust of the Freedom of Information Act. We canvassed the subject at some length three years ago in *EPA v. Mink*, and need only briefly review that history here. The Act revises § 3, the public disclosure section, of the Administrative Procedure Act. The revision was deemed necessary because "Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." Congress therefore structured a revision whose basic purpose reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." To make crystal clear the congressional objective — in the words of the Court of Appeals, "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" — Congress provided in § 552(c) that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated . . . " Consistently with that objective, the Act repeatedly states "that official information shall be made available 'to the public,' 'for public inspection.'" [Quoting ***Mink***]. There are, however, exemptions from compelled disclosure. They are nine in number and are set forth in § 552(b). But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. "These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c)...." [Quoting ***Mink***].

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-21, 223 (1978) (citations and footnotes omitted) (Opinion of the Court by Marshall, J.):

We have had several occasions recently to consider the history and purposes of the original FOIA of 1966. As we have repeatedly emphasized, "the Act is broadly conceived" [quoting *Mink*], and its "basic policy" is in favor of disclosure [quoting *Rose*]. Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.

* * *

The starting point of our analysis is with the language and structure of the statute.

Chrysler Corp. v. Brown, 441 U.S. 281, 290, 291-92 (1979) (citations omitted) (Opinion of the Court by Rehnquist, J.):

We have decided a number of FOIA cases in the last few years.[9] We have, moreover, consistently recognized that the basic objective of the Act is disclosure.[10]

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district

[9]Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material *may* be withheld or *must* be disclosed." [Quoting *Mink* (emphasis added by *Chrysl.*)].

[10]We observed in *Department of Air Force v. Rose* that "disclosure, not secrecy, is the dominant objective of the Act." The legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decisionmaking....

courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosures....

Federal Open Market Committee of the Federal Reserve System v. Merrill, 443 U.S. 340, 351-52 (1979) (citations and footnote omitted) (Opinion of the Court by Blackmun, J.):

This Court has had frequent occasion to consider the FOIA, and it is not necessary to describe its history and background in detail. It suffices to say that the purpose of the FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." The Act makes available to any person all agency records which it divides into three categories ...; all others must be promptly furnished on request. It then defines nine specific categories of records to which the Act "does not apply." The district court is given jurisdiction to enjoin an agency from withholding agency records, and to order the production of any agency records improperly withheld. The burden in any such proceeding is on the agency to establish that the requested information is exempt.

Baldrige v. Shapiro, 455 U.S. 345, 352 (1982) (footnote omitted) (Opinion of the Court by Burger, C.J.):

The broad mandate of the FOIA is to provide for open disclosure of public information. The Act expressly recognizes, however, that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b).

Federal Bureau of Investigation v. Abramson, 456 U.S. 615,

621 (1982) (citations omitted) (Opinion of the Court by White, J.):

The Freedom of Information Act sets forth a policy of broad disclosure of Government documents in order "to ensure an informed citizenry, vital to the functioning of a democratic society." Yet Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused.

Id., 456 U.S. at 635-36, 638, 642 (citations omitted) (Dissenting opinion of O'Connor, J.):

"[S]tatutory construction 'must begin with the language of the statute itself,' and '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" [Quoting *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982)]. In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation.

* * *

As we have emphasized before, the enumerated exemptions to the FOIA "[were] explicitly made exclusive" [quoting *Mink*], and "must be narrowly construed." [Quoting *Rose*].[5]

[5]Courts frequently refer to "the oft-repeated caveat that FOIA exemptions are to be narrowly construed," *ante*, at 2064 ("[t]he legislative history of the Act and the 1974 amendments to it support a narrow construction of the exemptions"); ("'disclosure, not secrecy, is the dominant objective of the Act,' and ... exemptions are to be 'narrowly construed'" (citations omitted); ("Exemptions in the FOIA are to be 'narrowly construed,' with all doubts resolved in 'favoring disclosure'") ("The exemptions provided by subsection (b) 'must be narrowly construed'" (citations omitted)).

The Act itself emphasizes that it "does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated*...." Moreover, the legislative histories of the Act and of the 1974 amendments dictate a narrow construction of the exemptions to the FOIA (the FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated* statutory language" (emphasis added)).

[I]t is elementary that the plain language interpretation of a statute enjoys a robust presumption in its favor. (Footnote omitted).

* * *

Unquestionably, of course, Congress' intent in enacting the FOIA was not singlemindedly to require disclosure whatever the costs. Congress realized that, under certain circumstances, the costs of disclosure exceed the benefits. Congress weighed those costs and benefits, and recorded the results of its deliberations in the "clearly delineated statutory language," of the FOIA's nine exclusive exemptions. The Senate Committee described the legislative balancing process: "It is not an easy task to balance the opposing interests, but it is not an impossible one either Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure."

Once having completed the arduous and demanding task of balancing interests, and having recorded the results in the nine enumerated exemptions from the FOIA, Congress then attempted to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the "availability of records to the public" is not limited, "except as *specifically* stated."

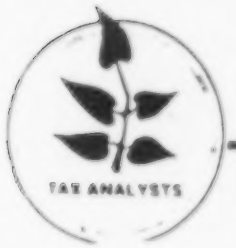
United States v. Weber Aircraft Corp., 465 U.S. 792, 794 (1984) (citation and footnote omitted) (Opinion of the court by Stevens, J.):

The Freedom of Information Act requires federal agencies to disclose records that do not fall into one of nine exempt categories.

U.S. Dep't of Justice v. Julian, ____U.S.____, 108 S.Ct. 1606, 1611 (1988) (citations omitted) (Opinion of the Court by Rehnquist, J.):

The system of disclosure established by the FOIA is simple in theory. A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b). Congress created these exemptions because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information." Nonetheless, "[t]he mandate of the FOIA calls for broad disclosure of Government records," and for this reason we have consistently stated that FOIA exemptions are to be narrowly construed.

APPENDIX II



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REPLY

BRIEF

(7)

Supreme Court, U.S.
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No. 88-782

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Lindsey v. *Bureau of Prisons*, 736 F.2d 1462 (11th Cir.), vacated, 469 U.S. 1082 (1984)	3, 6
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United States v. *Philadelphia National Bank*, 374 U.S. 321 (1963)	14
United States Department of Justice v. *Reporters Committee for Freedom of the Press*, No. 87-1379 (Mar. 22, 1989)	2, 4, 17
Warth v. *Department of Justice*, 595 F.2d 521 (9th Cir. 1979)	5
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FOIA Reform Legislation Enacted, Office of Information and Privacy, U.S. Dep't of Justice, *FOIA Update*, Fall 1986, at 1 13
1 *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) 12
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Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., *The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security* (Comm. Print 1978) 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-782

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

TAX ANALYSTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our opening brief, we endeavored to show three things: (1) that the purely judicial documents that respondent has requested from an Executive Branch agency do not constitute "agency records" as that term is used in subsection (a)(4)(B) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(B); (2) that the Department of Justice, which provides respondent with weekly logs of the opinions of the district courts in tax cases, has not "improperly withheld" anything within the meaning of subsection (a)(4)(B), given that respondent should be able to obtain the opinions from the district courts themselves; and (3) that the terms of FOIA should not be construed so as to make that statute redundant with the much more specific statute, 28 U.S.C. 1914, that governs public access to judicial records. Underlying all three of our arguments is the undisputed and indisputable proposition that the courts have an obligation, independent of any statute

governing the Executive Branch, to make their opinions available to the public. See Pet. Br. 14-15, 29-31.[1]

Respondent shows little interest in any of our arguments. As to "agency records," respondent disdains response to our legal arguments and citations and instead offers a litany of facts that respondent thinks suffice to meet "the tests this Court developed in *Forsham* and *Kissinger*." Resp. Br. 12; see *Forsham* v. *Harris*, 445 U.S. 169 (1980); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). But the Court did not develop any "tests" in those cases. Nor does respondent identify the "tests" it thinks the Court developed in those cases. Nor does respondent defend the "test" that the court of appeals erroneously ascribed (Pet. App. 17a-18a) to *Lindsey* v. *Bureau of Prisons*, 736 F.2d 1462 (11th Cir.), vacated, 469 U.S. 1082 (1984). Nor does respondent offer any "test" of its own. Nor does respondent offer (or even acknowledge the need for) any limiting principle to keep "agency records" from becoming a more expansive term than Congress (which did not define the term) can possibly have intended.

As to "improperly withheld," respondent merely argues that any withholding not explicitly authorized by a FOIA exemption is improper. But that argument finds no support in the statutory language; and it finds no support—because the phrase "improperly withheld" was not at issue—in any of the cases that respondent cites. Most important, it is flatly contrary to the one case in which this Court has construed "improperly withheld," in which the Court unquestionably upheld as not "improper" a withholding that did not purport to be justified by any statutory exemption. *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375 (1980). Respondent makes no effort to deal with the Court's reasoning in *GTE Sylvania*, and instead argues (Resp. Br. 23-24) essentially that the case should be confined to its facts.

As to the undesirable redundancy between respondent's position on the one hand and 28 U.S.C. 1914 and the courts' obligation to make their records available on the other, respondent simply blinks: throughout its brief respondent not only ignores this fundamental feature of

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[1] Our opening brief made these arguments of statutory interpretation and did not, as respondent contends, ask this Court to exercise its "general equitable discretion to decline to order disclosure of records that do not fall within one of the nine exemptions but which agencies think it inconvenient to produce." Resp. Br. 24-25. Our reference to equitable discretion in a single footnote of our opening brief (Pet. Br. 25 n.9) was meant to point out the D.C. Circuit's *error of statutory interpretation* in reasoning that "[t]he statute itself confers on the courts the power and responsibility to 'enjoin the agency from withholding' disclosable records, 5 U.S.C. § 552(a)(4)(B), indicating that it is the *agency's* responsibility to make its records available, whatever their source." Pet. App. 11a. As the footnote in our opening brief observed, that statement contains both a false premise and a conclusion that, in any event, does not follow from the premise. The premise is false because FOIA does not give courts the "responsibility," in the sense of making an injunction mandatory, to enjoin all improper withholdings. Repeating the plain language of Section 552(a)(4)(B), this Court recently wrote: "If an agency improperly withholds any documents, the district court has *jurisdiction* to order their production." *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, No 87-1379 (Mar. 22, 1989), slip op. 5 (emphasis added). "The Court will have *authority* whenever it considers such action *equitable and appropriate* to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (emphasis added); see also *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 28 (1967). Despite respondent's contention that "[t]his Court has laid this ghost to rest, not once but many times" (Resp. Br. 25), in fact this Court has never had occasion to decide the issue, and it was not discussed in any of the cases that respondent cites.

the case but also asserts that *only* respondent's implausible construction of FOIA will allow the public to know what the courts are doing and put the public on an "even playing field" (Resp. Br. 9) with the government. But the unprecedented result that respondent seeks in this case is hardly the only, or the most natural, solution to that problem, if it is a problem. If there is any problem with the availability of judicial opinions, respondent should be seeking better performance by the courts of their public functions, not attempting to "shift the task of processing requests for copies of decisions from * * * district court clerks to the Department of Justice." Br. in Opp. 1. Respondent's admitted purpose in this case is to reallocate the burdens and resources of government as between the Judicial and Executive Branches, but that is not what FOIA is about at all. The courts are excluded from FOIA, 5 U.S.C. 551(1)(B), 552(f) (1982 & Supp. V 1987), and the purpose of FOIA "is not fostered by disclosure of information * * * that is accumulated in various governmental files but that reveals little or nothing about *an agency's own* conduct." *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, No. 87-1379 (Mar. 22, 1989), slip op. 23 (emphasis added).[2]

[2] The Reporters Committee for Freedom of the Press has filed an amicus brief supporting respondent. The amicus brief adds little of substance to respondent's brief, and we confine our discussion of it to this footnote. Amicus seems to think this case is about public access to government compilations of material (Br. 21, 25-26, 29-37), but the case has nothing to do with that. Respondent seeks access to *uncompiled* district court opinions that are scattered throughout litigation files in the Tax Division of the Department of Justice. See C.A. App. 19-20. If the Department of Justice had chosen to compile all district court opinions in tax cases into one file, this might be a different case, but no such compilation exists. Respondent seeks to make the Department create for respondent's benefit a compilation that the agency has never thought it worthwhile to create for its own benefit. Amicus also

1. In our opening brief, we explained at some length (Pet. Br. 11-12) why we believe the Ninth Circuit was right in two cases[3] to hold, with respect to court-generated documents, that those documents prepared substantially to be relied on in agency decisionmaking (such as presentence reports) should be deemed "agency records" whereas documents not prepared for such purposes should not. Rather than offer any substantive response to our argument (see Resp. Br. 13 n.10), respondent merely assumes, relying on presentence report cases and cases not involving court records, that the *only* relevant questions are whether the agency possesses a document and whether the agency relies on the document in any way (*id.* at 11-15).[4] In so doing, respondent ignores the Court's ex-

construes our argument as one that would require members of the public to exercise "ingenuity" (Br. 21) in order to find publicly available materials, but amicus again has ignored the facts of this case: the Department of Justice has long supplied respondent with the information necessary to obtain district court opinions from the district courts themselves, and no "ingenuity" is required to do so. Amicus finally seems to fear that this Court will announce a general rule that agencies need never give out publicly available information (Br. 30-31), but no such rule is necessary to the disposition of this case. All the Court need do is agree with the D.C. Circuit's earlier position that "special policy considerations militate against a rule compelling disclosure of records originating in [the courts] merely because such documents happen to come into the possession of an agency" (*McGehee* v. *CIA*, 697 F.2d 1095, 1107, vacated in part on other grounds, 711 F.2d 1076 (D.C. Cir. 1983)) and hold that the Department of Justice need not give out *court* records that are publicly available *from the courts*.

[3] *Berry* v. *Department of Justice*, 733 F.2d 1343, 1349 (1984); *Warth* v. *Department of Justice*, 595 F.2d 521, 523 (1979).

[4] Respondent also seeks to equate this case with *Crooker* v. *United States Parole Commission*, 469 U.S. 926 (1984), but the cases are quite different from one another for the reasons given in our opening brief (at 16-17 n.4).

press statements in *Forsham* v. *Harris, supra,* that the considerations the Court found helpful in the particular context of that case "are not dispositive" (445 U.S. at 183-184) and that physical possession is not always sufficient to make a document an "agency record" (*id.* at 185 n.16).

In essence, respondent misreads the decisions of this Court in the same way that the court of appeals misread the Eleventh Circuit's decision in *Lindsey* v. *Bureau of Prisons, supra.* See Pet. Br. 13 n.3. Respondent equates those conditions that are *necessary* to make a document an agency record, and whose absence was accordingly dispositive in *Forsham* and in *Kissinger* v. *Reporters Committee, supra,* with conditions *sufficient* to make a document an agency record. But this Court in *Forsham* and *Kissinger* did not purport to set out any "tests" cataloguing all factors that should be deemed sufficient, in cases not then before the Court, to make a document an agency record.

What is most striking about respondent's position before this Court is that it acknowledges no limiting principle that would relieve the government of the obligation to produce any and all reference materials—save those that no one ever consults for any reason—contained in an agency's library or in any other kind of file that is maintained solely for reference purposes. The logic of respondent's position would argue that every library book whose check-out card shows that any one person in the agency had ever borrowed it, presumably for agency business, is an "agency record," for information found therein could "move" the government to act in some way (see Resp. Br. 13-14). That position pushes the undefined term "agency record" well past the point of absurdity.

Although respondent attempts to portray its FOIA request as one that will "open agency action to the light of public scrutiny" (Resp. Br. 14 (quotation marks omitted)),

that effort is quite strained. Respondent (and anyone else making an undifferentiated request for all district court opinions and orders in tax cases) is not trying to learn about the agencies' activities in "prepar[ing] and fil[ing] a bill of costs" or collecting judgments or "comput[ing] any refund due" or even deciding whether to appeal (Resp. Br. 5). The purpose of respondent's request is to learn the *contents* of district court decisions, not what the agency is doing with them. That is an entirely reasonable thing for respondent to want to do, but it is not reasonable for respondent to assert that the fact that the Department of Justice takes a number of routine steps when it receives court decisions suffices to transform those decisions from court records into "agency records." There is no reason to construe that statutory term so as to empower respondent to make the Executive Branch collect and reproduce for it what respondent should obtain from the courts themselves.

2. According to respondent, the government has "improperly withheld" agency records within the meaning of 5 U.S.C. 552(a)(4)(B) whenever it is established that the government has possession of the records, has not produced the records in response to a FOIA request, and cannot point to any express statutory exemption. Respondent refuses to admit that the phrase "improperly withheld" can ever have substantive content. Respondent instead contends that 5 U.S.C. 552(d) (Supp. V 1987), the legislative history of FOIA, and this Court's cases all make it "clear" that the phrase was intended to have no real meaning. Resp. Br. 15-24. Yet respondent relies entirely on the language, legislative history, and judicial interpretations of FOIA provisions *other than* Section 552(a)(4)(B). In so doing, respondent errs.

Respondent's reliance on what it perceives to be the clear language of Section 552(d) is misplaced. According

to respondent, "§552(d) expressly declares [that] agencies must disclose all their records unless a specific record is exempt under one of FOIA's nine exemptions." Resp. Br. 17. Section 552(d), however, "expressly declares" nothing of the kind.

What that subsection actually says is that "[t]his section *does not authorize* withholding of information or *limit* the availability of records to the public, except as specifically stated in this section." 5 U.S.C. 552(d) (Supp. V 1987) (emphasis added). What respondent takes it to mean is that "[t]his section *forbids* withholding of information and *commands* the availability of records to the public [through FOIA-covered agencies], except as specifically stated in this section." There is a world of difference between what the statute says and what respondent takes it to mean. "Does not authorize" is not the same thing as "forbids."

Statutes, especially those that seem to deal comprehensively with an area, sometimes are interpreted to permit, affirmatively, whatever they do not forbid, or to forbid whatever they do not authorize. See, *e.g.*, *United States* v. *Fausto*, 108 S. Ct. 668 (1988); *Brown* v. *GSA*, 425 U.S. 820 (1976). In particular, the original Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002 (1964), was phrased exclusively as an affirmative command to make "matters of official record" available (5 U.S.C. 1002(c) (1964)), yet it "came to be looked upon more as a withholding statute than a disclosure statute." *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); see also S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965) (old Section 3 "is cited as statutory authority for the withholding of virtually any piece of informtion that an official or an agency does not wish to disclose"). Section 552(d) merely disables courts and agencies from relying on any such interpretive principle in construing FOIA. Congress chose words that expressly preclude that result.

Had Congress intended to achieve the quite different result that respondent attributes to it, Congress presumably would have chosen words better suited to that purpose, and would not have used "does not authorize" as a roundabout way to express the concept of prohibition. The words that Congress *did* choose, however, are "does not authorize." Those words, we submit, have their ordinary meaning.

In any event, respondent's interpretation of Section 552(d) is flatly inconsistent with *GTE Sylvania, Inc.* v. *Consumers Union of the United States*, 445 U.S. 375 (1980). If Section 552(d) meant, as respondent contends, that every withholding must be deemed "improper" unless expressly sanctioned by a FOIA exemption, then the Court in *GTE Sylvania* could not have deemed the withholding there to be anything other than an "improper withholding" under FOIA. Yet the Court expressly held that there had been no "improper withholding." Respondent states without elaboration that "*GTE* establishes the only lawful excuse for withholding outside the statute" (Resp. Br. 16 n.11), but that simply cannot be so. Either respondent is right in its construction of Section 552(d)—and there accordingly cannot be *any* exception to the rule that all withholdings not authorized by an exemption are "improper"—or there is a category of withholdings that, despite being unauthorized by any exemption, nevertheless are proper.

If the latter is the case (as it must be, unless the Court is prepared to overrule *GTE Sylvania*), then there is simply no basis for insistence that the category consists in its entirety of cases identical to *GTE Sylvania*. That is so because, as we noted in our opening brief (at 23-24), the

Court's reasoning in *GTE Sylvania* was based on principles extending well beyond the facts of that case. We explained in our opening brief (at 24-28) that the principles underlying *GTE Sylvania* lead to the conclusion that there has been no improper withholding in this case (as the district court held). Respondent has completely failed to answer that argument, instead insisting that neither the government nor this Court is entitled to take those principles into account.

Respondent cannot make its case by relying on the legislative history of, and cases interpreting, FOIA provisions other than Section 552(a)(4)(B). None of the legislative history that respondent cites suggests that *GTE Sylvania* was wrong to construe "improperly withheld" as a statutory phrase with substantive content, and none of the cases on which respondent relies overrules *GTE Sylvania*. Rather, the legislative history and case law that respondent cites are concerned almost exclusively with the exemptions contained in subsection (b) of FOIA, 5 U.S.C. 552(b). Completely different values, policies, and statutory texts are at stake in construing subsection (b) than are at issue here. Specifically, this case is about identifying the proper channel—whether it is through the courts or through the Executive Branch—for public dissemination of judicial opinions, whereas subsection (b) (exemption) cases are about the more fundamental issue whether particular governmental information should or should not be publicly available.

As this Court observed in *EPA* v. *Mink*, 410 U.S. 73, 80 (1973):

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses.

As that passage suggests, subsection (b) is about confidentiality, and this Court's and Congress's comments about how to construe subsection (b) are applicable only when the disputed issue is confidentiality. Here, confidentiality is not what is at issue at all (nor, for that matter, is "access to official information long shielded unnecessarily from public view" at issue). What is at issue is how respondent should go about obtaining documents that no one suggests are in any way confidential. The "improper withholding" dispute arises in that context, and comments about the general operation of FOIA in functionally dissimilar contexts are of no aid.

Finally, respondent is grasping at straws in urging this Court to conclude, from the inaction of Congress between 1981 and 1986 on certain bills proposed by the Department of Justice, that "Congress intends * * * the FOIA to require agencies to produce to requesters court-issued documents like decisions." Resp. Br. 20. We disagree with respondent's chronology of the proposed legislation,[5] but respondent's error in seeking to draw inferences from

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[5] Discussion of possible legislation to make clear that FOIA does not require agencies to copy and provide to the requester items that are on the public record did not, as respondent suggests (Resp. Br. 20), begin with a proposal from the Department of Justice after respondent began requesting such information in 1979. Rather, the topic was under discussion at least as early as 1978, when a Senate subcommittee proposed that, "[w]here public record items such as newspaper clippings and court records are incorporated in the file, the agency should not be required to xerox these for the requestor, but should, instead, simply be required to identify these items by date and source." Subcomm. on Criminal Laws and Procedures of the Senate

events of the 1980s concerning the meaning of a statute passed in 1966 is a much more fundamental one in any

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Comm. on the Judiciary, 95th Cong., 2d Sess., *The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security* 71 (Comm. Print 1978). In 1981, there were three (not two) bills proposed that, as a relatively minor part of extremely extensive and wide-ranging FOIA reform, essentially would have implemented that recommendation. S. 587, § 8, *reprinted in* 1 *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 9-10 (1981) [hereinafter *1981 Hearings*]; S. 1730, § 4(7), *1981 Hearings* 38; S. 1751, § 2(c)(7), *1981 Hearings* 55. S. 1730 was not, as respondent asserts (Resp. Br. 18 & n.12), introduced at the request of the Department of Justice (nor was S. 587). Senator Hatch introduced S. 587 on February 26, 1981, and S. 1730 on October 7, 1981. *Id.* at 4, 30; see also *id.* at 627, 765, 807, 811, 813. The Department of Justice proposed its bill, which became S. 1751, on October 15, 1981. *Id.* at 637-704; see also *id.* at 167. In the 1147-page transcript of the 1981 hearings, virtually no attention was paid to the proposed "public records" amendment, and what "Congress" or anyone else (other than the Justice Department and Senator Hatch) thought of the proposal is impossible to discern. (Even the Reporters Committee for Freedom of the Press, which assailed the proposed legislation as an "attack to mutilate the FOI Act," *id.* at 777, offered no comment on the "public records" amendment.) But see *id.* at 883 (comments of American Civil Liberties Union and Freedom of Information Clearinghouse). The Senate Judiciary Committee unanimously favored an amended version of S. 1730, but the 97th Congress did not pass any FOIA reform legislation. See S. Rep. No. 690, 97th Cong., 2d Sess. (1982). In the 98th Congress, a bill similar to S. 1730 was passed by the Senate. S. 774, 98th Cong., 1st Sess., 130 Cong. Rec. 3492-3495 (1984). In *support* of S. 774—not in criticism of earlier proposals—the Senate Judiciary Committee (not, as respondent claims (Resp. Br. 10), "the Congress") made the comments that respondent has quoted. See S. Rep. No. 221, 98th Cong., 1st Sess. 20 (1983), *quoted in* Resp. Br. 10, 19-20. The 98th Congress, however, did not enact S. 774 or any other general FOIA reform bill into law, any more than the 97th Congress enacted the proposals that were before it. See generally *FOIA Reform Effort Stalls in House*, Office

event. Respondent has ignored the axiom of statutory interpretation that "[t]he advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate." *American Trucking Associations* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 418 (1967).

The Court made the same point forcefully in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950): "We do not feel justified in holding that a request for and failure to get in a single session of Congress clarifying legislation on a genuinely debatable point of agency procedure admits weakness in the agency's contentions." See also *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1153-1154 (1988); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981); *Red Lion Broadcasting Co.* v. *FCC*,

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of Information and Privacy, U.S. Dep't of Justice, *FOIA Update*, Fall 1984, at 1. In 1986, after a long legislative impasse, the 99th Congress did pass FOIA reform legislation that incorporates some (but by no means all) of the features proposed in earlier bills, but the legislation, hastily incorporated into a much larger bill, was not accompanied by any significant explanatory materials. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Subtit. N, §§ 1801-1804, 100 Stat. 3207-48 to 3207-50; see also *FOIA Reform Legislation Enacted, FOIA Update*, Fall 1986, at 1 (summarizing chronology of legislation); *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 1 (1987). Congress's thinking in the 1980s on the subject of FOIA-based access to publicly available materials is thus entirely unclear. For respondent to contend from this legislative history that "Congress dealt specifically with the question of disclosure of court records and made it clear that FOIA required agencies to disclose them" (Resp. Br. 18) is totally unwarranted.

395 U.S. 367, 382 n.11 (1969); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-612 (1966); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963); *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957). In several of these cases, the basis for inferring that "Congress intend[ed]" (Resp. Br. 20) to reject the result for which the government later contended in litigation was vastly stronger than the thin reeds on which respondent's argument rests here, but the Court drew no such inference.[6]

Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974), on which respondent relies, is not at all contrary to the long line of cases cited above. The Court in *Gulf* was construing Section 2(a) of the Robinson-Patman Act, and the Court drew a negative inference about a particular interpretation from the rejection by *the very Congress that passed Section 2(a)* of language that would have supported

[6] For example, in *Dean Foods*, two different chairmen of the Federal Trade Commission appeared before Congress to urge the need for legislation to allow the FTC to seek preliminary injunctions in court. Moreover, some courts had held that the FTC lacked that power, and some Congressmen commented that there was a need for statutory amendment. 384 U.S. at 608-609. This Court nevertheless held that the FTC had had such power all along under the All Writs Act. In *Philadelphia National Bank*, both the Department of Justice and Members of Congress had squarely taken the position that bank mergers were beyond the reach of Section 7 of the Clayton Act, and that understanding "may have played some part in the passage of the Bank Merger Act of 1960." 374 U.S. at 348-349. This Court, however, refused to infer from those facts that bank mergers were in fact beyond the reach of Section 7. In *du Pont*, the FTC before 1950 had expressly said that Section 7 did not apply to vertical acquisitions, and the FTC then sought and obtained legislation amending Section 7 to make clear that it applied to vertical acquisitions (see 353 U.S. at 590), yet this Court, construing the *pre*-1950 version of Section 7 (see *id.* at 588 n.4), held that it *did* apply to vertical acquisitions.

that position. Here, respondent does not rely on any "rejection" by the same Congress that passed Section 552(a)(4)(B) of language that would have more clearly supported the government's position in this case. Rather, respondent relies on comments by a single committee of a single house of a *subsequent* Congress *supporting* proposed but unenacted legislation bearing on the subject now at issue. See note 5, *supra*. That kind of reliance is the sort that the Court rejected in cases like *Wong Yang Sung* and *Dean Foods* and *Philadelphia National Bank*, not the sort that the Court accepted in *Gulf Oil*.

For all of these reasons, respondent is wrong (as is the court of appeals) in insisting that "improperly withheld" cannot be construed to have substantive content in the context of a case such as this one. Once respondent's absolutist argument is rejected, it should be clear that there has been no "improper[] withh[olding]" here. The district court so concluded, and we showed in our opening brief that the district court was correct. Neither respondent nor the court of appeals has offered any reason other than their threshold argument, and respondent's erroneous inference from legislative inaction, for reaching the opposite conclusion.

3. A basic error permeating respondent's brief is its total failure to acknowledge the responsibility of the courts to make their own documents available. Thus, respondent bases much of its case on the proposition that "[p]rompt public access to the documents after petitioner and IRS receive them is practicable only from petitioner and through the FOIA" (Resp. Br. 9), but that simply is not so. There is no reason why the courts cannot "practicabl[y]" make their decisions available to respondent in accordance with 28 U.S.C. 1914. If they *are not* doing so, the matter should be taken up with the Administrative

Conference or otherwise with the courts. Separation-of-powers concerns as well as common sense indicate that allegedly inadequate performance by the courts of their public information function is no reason why those selfsame courts should construe undefined terms in an Act of Congress in such a way as to make the Executive Branch do the work.

Respondent exaggerates considerably in suggesting that this case will determine whether there will be "an even playing field" as opposed to a system "where the government often learns about changes in the rules considerably before the taxpayer." Resp. Br. 9. The *Federal Supplement* publishes all opinions that district courts designate for publication, and there is no reason to believe that the district courts are "chang[ing] * * * the rules" and refraining from using that established channel to communicate such changes to the public, or that they are in any way withholding from the public the as-yet-unpublished versions of significant substantive opinions. Cf. Pet. App. 10a n.10 (observing that unpublished decisions are not precedent). The Tax Division of the Department of Justice certainly has never thought it necessary to create any centralized file of unpublished district court opinions and orders so that "changes in the rules" will be known within the agency. And, if there is in fact a problem along these lines—if district courts are making significant new law in unpublished and unavailable decisions—then the sensible solution is better judicial performance, not a construction of FOIA to achieve a result that has nothing to do with the purpose for which it was enacted.

Respondent joins the court of appeals in claiming that "[t]his is not * * * a case in which a commercial publisher is seeking to shift its operating costs to federal taxpayers but rather one in which existing governmental machinery is

being used to enhance the efficiency of a privately provided public service, ensuring prompt public access to federal court decisions," and that "[s]uch a result is not at odds with the goals of the FOIA." Pet. App. 12a n.13, *quoted in* Resp. Br. 7. That claim is quite wrong. There is no "existing government machinery" that can be used to provide respondent with the weekly access that it requests, and there is no way for the government to recover from respondent the full cost of creating such machinery. The goal of FOIA—opening *agency* decisionmaking to public scrutiny—may not be "at odds with" the result that the court of appeals reached, but neither is it *furthered* by that result. A statute should not be construed to *require* a result—and to shift a commercial publisher's operating costs to the taxpayers—just because that result is not antithetical to its purpose.

Ultimately, this case involves nothing but respondent's dissatisfaction with the day-to-day operation of the established system for obtaining court records from the courts. Having found that system inconvenient, respondent seeks to bypass that system and obtain more convenient access to publicly available records through the Department of Justice. But Congress has passed only a Freedom of Information Act, not a Freedom from Inconvenience Act. The purpose of the Act is to open up to public scrutiny the operations of "agenc[ies]" as defined in 5 U.S.C. 552(f) (Supp. V 1987) and 5 U.S.C. 551, not the courts, whose operations in this country have never been thought to be shrouded in excessive secrecy. Here, as in this Court's recent *Reporters Committee* decision, "the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records" (slip op. 23); "the request seeks no 'official information' about a [FOIA-covered] Government agency, but

merely records that the Government happens to be storing" (*id.* at 30). Absolutely nothing that Congress sought to promote through that Act is at stake here, and there is no reason why two statutory terms that Congress did not define—"agency records" and "improperly withheld"—need to be or ought to be given an expansive construction in order to achieve the result respondent seeks.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
October Term, 1988

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

TAX ANALYSTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF THE RESPONDENT

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No. 88-782

In The
Supreme Court of the United States
October Term, 1988

United States Department of Justice
Petitioner,

v.

Tax Analysts
Respondents.

On Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit

Brief of Amicus Curiae The Reporters Committee for Freedom of The Press In Support of Respondent

STATEMENT OF INTEREST

The Reporters Committee For Freedom of the Press is a voluntary association of reporters and news editors from the print and broadcast media. The Reporters Committee, founded in 1970, is governed by a steering

committee of news reporters from around the country. Its legal defense and research efforts are devoted to the protection of First Amendment values and freedom of information interests of the news media.

The Reporters Committee has provided information, representation, legal guidance and research in virtually every significant federal and state appellate press freedom case since 1972.

As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which advises reporters on issues of access to government records and proceedings. The FOI Service Center daily handles calls from reporters and editors who are frustrated in their efforts to use the FOI Act. Increasingly, failure of federal agencies to provide requested information affects the ability of

reporters to cover and report on governmental activities in an accurate and timely manner.

Because of its expertise gained through ongoing operation of the FOI Service Center, the Reporters Committee believes it can offer this court a significant and different perspective from that provided by the parties.

The Reporters Committee has written permission from both parties to file this brief. Copies of their letters have been filed with the clerk in accordance with U.S. Supreme Court Rule 29.

STATEMENT OF THE CASE

This Freedom of Information Act case arose out of a series of weekly requests submitted by Tax Analysts to the Tax Division of the Department of Justice, seeking copies of all U.S. District Court decisions that the Tax Division had received during the previous week. Tax Analysts is a non-profit organization which reports, through a weekly magazine, legislative, judicial and regulatory developments in the field of federal taxation to the public.

The Tax Division denied the requests, and Tax Analysts then brought an action in U.S. District Court for the District of Columbia to compel the Tax Division to release the documents. The district court dismissed the case on the Tax Division's

summary judgment motion, ruling that because the documents were already available from the courts, they could not be "improperly withheld" by the Tax Division. The district court did not address the issue of whether the documents at issue were agency records under the FOI Act.

The Court of Appeals for the District of Columbia reversed. The appeals court rejected the lower court's determination that the documents had not been improperly withheld, ruling that the copies of the decisions were agency records and must be disclosed under the FOI Act unless exempted by statute. The court found that there is no FOI Act exemption for district court decisions and orders in the hands of an agency custodian and rejected the Tax Division's argument that availability from another source absolved the agency from its duties

to provide the documents to FOI Act requesters. See Tax Analysts v. Department of Justice, 845 F.2d 1060, 1064 (D.C. Cir. 1988). The court then remanded to the district court with instructions to enter an order requiring the Tax Division to provide access to its copies of the district court opinions and orders.

The Court of Appeals subsequently denied rehearing en banc, and this court granted the Department of Justice petition for certiorari on January 9, 1989.

SUMMARY OF THE ARGUMENT

The Freedom of Information Act requires disclosure of agency records by government agencies unless a specific statutory exemption applies to the information requested. The FOI Act does not exempt U.S. District Court tax decisions from disclosure. The Tax Division of the Department of Justice keeps the decisions in its files, and admits that it uses and relies on them in deciding whether to litigate tax cases. The district court decisions are thus agency records and must be disclosed under the FOI Act.

The Tax Division has no legal justification for refusing to disclose the copies of the decisions to Tax Analysts or to any other member of the public. No court has ever held that public availability from other

sources of information requested under the FOI Act is an excuse for withholding the requested information. Moreover, many courts have said that administrative burden is not an excuse for withholding non-exempt materials, and administrative burden is at the heart of the Department of Justice's withholding in this case.

This case has far-reaching implications for members of the news media and the public. If this Court permits the Department of Justice to withhold information simply because that information is ostensibly available elsewhere, public access to a variety of different information which had previously been disclosed under the FOI Act will be severely compromised.

ARGUMENT

I. The FOI Act Requires Disclosure Of Agency Records Unless The Agency Can Show That A Specific FOI Act Exemption Applies To Those Records.

The Freedom of Information Act is intended to express, in statutory form, the firm obligation of government agencies to disclose to any person identifiable information in their possession, limited only by certain exemptions. The Act specifically denies the federal agencies any right to refuse to disclose any materials covered by the Act for any reason other than those contained in the exemptions. In short, the Act makes disclosure the rule and secrecy the exemption. Sears v. Gottschalk, 502 F.2d 122, 128 (4th Cir, 1974), cert. denied, sub nom. Sears v. Dann, 422 U.S. 1056 (1975). See also Department of Air Force v. Rose,

425 U.S. 352, 360-361 (1976) and E.P.A. v. Mink, 410 U.S. 79, 89 (1973).

This Court has said that "FOIA requires that records and material in the possession of federal agencies must be made available on demand to any member of the general public." National Labor Relations Board v. Robbins Tire & Rubber, Co., 437 U.S. 214, 221 (1978).

In this case, Tax Analysts requested copies of district court tax decisions in the-files of agency custodians in the tax division of the Justice Department. The Tax Division refused to disclose the decisions, arguing that they were not agency records and not covered under the FOI Act. The Tax Division is wrong; district court decisions in the department's litigation files are agency records subject to the FOI Act.

A. District Court Decisions In The Hands Of An Agency Which Relies On Them And Incorporates Them Into Its Files Are Agency Records Under The FOI Act.

The threshold inquiry in any FOI Act case is whether the documents are, in fact, agency records. Wolfe v. Department of Health and Human Services, 711 F.2d 1077, 1079 (D.C. Cir. 1983) However, because Congress intended that the FOI Act be broadly applicable, it did not limit the term "agency records" to any specific types of documents. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

The courts have interpreted Congress' use of the term "agency records" since the enactment of the FOI Act. The first courts to address the issue looked at whether the records were in the "control" of the agency receiving the request. "Control" was nebulously defined as agency dominion over the file, specifically the agency's ability to

change the contents of the document and its ability to disseminate the document. The control test was applied with varying results in Goland v. C.I.A., 607 F.2d 339 (D.C. Cir. 1973) (congressional transcript in the possession of the C.I.A. not an agency record because transcript was used by CIA for limited purposes as a reference document.); Ryan v. Dept. of Justice, 617 F.2d 781 (D.C. Cir. 1980) (senators' responses to Justice Department questionnaires concerning the procedures they used for selecting and recommending judicial nominees were agency records) and Carson v. Dept. of Justice, 631 F.2d 1008 (D.C. Cir. 1980) (presentence investigation in the hands of the Parole Board are agency records) The Second Circuit acknowledged difficulty with the control test in Crooker v. U.S. Parole Commission, 730 F.2d 1 (2d Cir. 1981) va-

cated, 469 U.S. 926 (1984). "Of course, control is a protean term and courts have not adhered to a single variant of the control test for determining whether a document is an agency record for FOIA purposes." 730 F.2d at 3.

In the court below, the Department of Justice argued that it did not have "control" of the district court opinions because it did not create them and could not alter their contents. It argued that there is no indication that the courts intend to relinquish the inherent control they exercise over their own records. As the Court of Appeals pointed out below, this argument confuses control over document content with control over disposition and dissemination of copies of the document itself.

> It is axiomatic that courts and Congress...retain ultimate control over the contents of the records they create. But court orders, decisions

> and opinions may be used, duplicated and distributed by other agencies for their own purposes without detracting from the court's basic authority to amend or vacate them. Here, the Courts retain no control over what happens to copies of the tax decisions they distribute to the Tax Division.

Tax Analysts v. Department of Justice, 845 F.2d 1060 at 1068.

The Department of Justice now argues that its ability to disseminate the opinions is not "control" because any private individual could disseminate the opinions. In essence, the Department of Justice argues that if "control" is not exclusive, it is not really control. No court has ever made such a distinction. The fact that the Tax Division retains, relies upon and refers to the copies of the decisions means that the Tax Division has "control" of the opinions under the "control" test and that the decisions are thus agency records of the Tax Division.

This Court has never specifically adopted the "control" test for determining what are agency records under the FOI Act. However, this court directly addressed the agency record issue in Forsham v. Harris, 445 U.S. 169 (1980). In Forsham, this Court found that raw data, owned and possessed by a privately controlled organization receiving federal grants, were not agency records under the FOI Act, stressing that the Department of Health, Education and Welfare had never obtained the data even though it had the authority to do so, and the agency had not relied upon the raw data in any of its decision-making activities. Id. at 181-82. But the Court also said that a document may be an agency record, disclosable under the FOI Act, even though it is not

created by the agency itself as long as it is obtained and used by the agency. In making this determination, this Court looked to The Record Disposal Act for guidance in defining the FOI Act term "agency record." Agency records could include "all books, papers, maps...or other documentary materials regardless of physical form...made or received by an agency of the United States under federal law or in connection with the transaction of public business. Id. at 183. (emphasis added) See also Kissinger v. Reporters Committee For Freedom of the Press, 445 U.S. 136 (1980)(holding that telephone logs of former Secretary of State Kissinger, in the files of the State Department, were not agency records because they merely resided in agency files and were not used by the agency for any reason).

In RCA Global Communications Inc. v. FCC, 524 F.Supp 579, 583 (D.Del 1981), a federal district judge adopted a function test for determining whether a document is an agency record. The judge determined that the control test used by the circuit courts had been superseded by the function test implicitly adopted by this Court in Forsham and Kissinger. Id. at 583.[1] The aspects of function that the judge in RCA found dispositive were that the documents

> "involved in this case are in the possession of the FCC in order to help it

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[1] The judge stated,

> This emphasis on the function of the document in the agency's decision-making process conforms to the legislative purpose of the FOIA, which was to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.' Id. at 583, quoting Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1976), aff'd, 425 U.S. 352 (1976)

> determine what if any action to take...[and] That decision is one to be made in the regular course of the FCC business...and public scrutiny of how that decision was made was an objective of the FOIA."

He went on to rule "These facts alone are sufficient to make these documents agency records." Id. at 583.

The compilation of decisions sought by Tax Analysts in the instant case are in the possession of the Tax Division so it can refer to them in determining what, if any, action to take in similar cases. The Tax Division exists for the purpose of making these determinations. Thus, under the function test the copies of the decisions are agency records of the Tax Division. Therefore, whether this Court uses the "control" test or the "function" test it is clear that the tax decisions in the hands of the Tax

Division are agency records which must be disclosed under the FOI Act.

B. The Department of Justice Improperly Withheld The District Court Decisions Because No FOI Act Exemption Applies To Them.

Under the FOI Act, a governmental agency improperly withholds agency records if it does so for any reason not specifically stated in an exemption or other portions of the statute. This Court has confirmed that withholding is unwarranted except for reasons specifically stated, and that the nine exemptions in the FOI Act are exclusive. E.P.A. v. Mink, 410 U.S. 73; Dept. of Air Force v. Rose, 425 U.S. 352.

In GTE Sylvania v. Consumers Union of the United States, 445 U.S. 375, 385-386 (1980), this court explained that the phrase "improperly withheld" covered both conscious

governmental efforts to hide mistakes or irregularities and needless denials of information. A "needless denial of information" is any denial of a request for information without an adequate basis for nondisclosure. Id. Any denial of information not based on a statutory exemption constitutes "improper withholding" by that agency.

The Department of Justice does not assert that any of the nine exemptions applies. If this court accepts the agency's arguments for withholding, it will effectively create new exemptions for those records which are otherwise publicly available, or the disclosure of which would create administrative burden.

1. Public Availability Is Not A Defense To Disclosure Under The FOI Act.

Nothing in the Act exempts compilations of information contained in public records from disclosure. The Act does not require members of the public to first exhaust their own ingenuity and energy to gather information which is already compiled and organized by government officials. Ackerly v. Ley, 420 F.2d 1336, 1342 (D.C. Cir. 1980). In construing the FOI Act, the D.C. Circuit said "The fact that an appellant might...ferret out some of the materials received is surely no reason to suppose that Congress made revelation under the FOIA contingent upon a showing of ingenuity." Id.

State courts have also ruled under their own open records acts, often modeled after the FOI Act, that public availability from other sources is not a defense to disclosure under a FOI Act-type scheme. In Cincinnati

Post v. Schweikert, 527 N.E.2d 1230 (Ohio 1988), the Ohio Supreme Court said

> The law itself does not exempt compilations or derivations of information contained in public records. Frequently, governmental agencies make such compilations. The law does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense.

Id. at 1233. See also Hearst Corp. v. Hoppe, 580 P.2d 246, 251 (Wash 1978)(Washington Supreme Court held that information contained in county assessor's files must be disclosed regardless of the fact that the information was publicly available in other records).

The two principal cases cited by the Department of Justice, SDC Development Corp. v. Matthews, 542 F.2d 1116 (9th Cir. 1976) and Lead Industries v. OSHA, 610 F.2d 70 (2d Cir. 1979), do not directly or indirectly

exempt compiled information from disclosure on the grounds that individual portions are otherwise available to the public.

The Department of Justice characterizes SDC v. Matthews as a case in which the court refused to require disclosure of a computer database of medical information under the FOI Act because the information was already available to the public upon payment of a subscription fee. In fact, the court in SDC refused to require disclosure because of the specific mandate of the National Library of Medicine Act requiring that costs for the information retrieval system be recouped through subscription charges. Id. at 1120. The court's decision was based on recognition that the National Medicine Library had spent large sums of money compiling the retrieval system and that the law required that the costs be offset through

subscription charges. The court decision did not turn on the fact that some of the material was already publicly available elsewhere.

The Department of Justice also incorrectly characterizes the court's decision in Lead Industries v. OSHA. In Lead Industries, a trade association sought access to documents compiled by OSHA in the course of preparing revised standards for exposure to lead. The Second Circuit refused to order disclosure under the FOI Act because it determined that the facts OSHA had selected for summarization were exempt from disclosure on deliberative process grounds. The court's decision rested entirely on Exemption 5. The court did not rule that withholding was permissible because the material was already publicly available.

The Department of Justice argues that ostensible public availability of the court decisions sought here permits it to withhold the information under the FOI Act, but cites no authority for this extraordinary proposition. In fact, one federal court recently held that public availability from other sources does not even justify a denial of a fee waiver, much less complete denial of the information. In Coalition for Safe Power Inc. v. Department of Energy, No. 87-1380-PA (D.Ore. June 1, 1988), the court held that a government agency could not refuse to waive fees for providing a copy of a report merely because the document was in an agency public reading room 230 miles away from the requester. By analogy, it is absurd for the Department of Justice to argue that it can deny a request simply because the individual component parts of its compi-

lations are ostensibly available elsewhere.

2. Administrative Burden Is Not A Defense To Disclosure Under The FOI Act.

Although the government has tried to use the administrative burden excuse many times, the courts have never accepted it as a plausible FOI Act defense against release of information. In Sears v. Gottschalk, 502 F.2d 122, cert. denied sub nom, Sears v. Dann, 422 U.S. 1056, the Fourth Circuit held that "equitable considerations of the costs in time and money of making records available for examination do not supply an excuse for non-production." Id. at 126. The Ninth Circuit adopted this reasoning in Long v. Internal Revenue Service, 596 F.2d 362 (9th Cir. 1980) cert. denied, 446 U.S. 917 (1980). In Long, the court forced the IRS

to disclose information it had compiled in the Tax Payer Compliance Measurement Program. The court acknowledged that the editing and segregating procedures necessary for disclosure would be time consuming but said,

> "Despite the massive expenses that can be involved in even a single request, Congress has not limited access under the Act. Whether such expenditures are good policy is not a question for us to decide. Congress has determined that access to government records is an important objective.

Id. at 367. See also Ferguson v. Kelly. 455 F.Supp 325 (N.D. Ill 1978)[2]

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2 "That response to a FOIA request may be time consuming or burdensome is not a defense." Wellford v. Hardin, 315 F.Supp 175 (D.Md. 1970), aff'd, 444 F.2d 21 (4th Cir. 1974). Allowing such a defense would undercut the Act's broad policy of disclosure. Id. at 326.

In Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), various groups sought access to all documents and files relating to the role of former F.B.I. Director L. Patrick Gray in any aspect of the Watergate scandal. The government had argued that administrative burden caused its delay in responding, and the court acknowledged that delay was acceptable given the volume of the request, and that an agency may, in "exceptional circumstances," take more time to respond to a FOI Act request than is allowed in the statute. However, the court never considered the possibility that administrative burden would justify complete denial of the information.

This Court has steadfastly refused to recognize agency denial based on administrative burden. It should continue to uphold

the public disclosure mandate of the FOI Act by refusing to accept the administrative burden excuse in this case.

II. Public Access To Government Compilations Of Information Will Be Greatly Curtailed If Agencies Can Withhold Such Information Simply Because It Might Already Be Publicly Available.

In the course of performing its duties, the federal government gathers a vast storehouse of information from many sources. For instance, the Tax Division collects district court tax decisions, the Drug Enforcement Agency collects drug enforcement information from local law enforcement agencies, and the Nuclear Regulatory Commission compiles technical information from public and private entities involved in nuclear energy. All of this information is available to the public under the FOI Act unless it is specifically exempt. See 5 U.S.C. § 552. The exemptions

represent a determination by Congress that, in limited and precisely defined situations, the public interest in disclosure is outweighed by a competing interest served by confidentiality. For example, information that would compromise the national defense or would interfere with foreign relations or would reveal trade secrets has been deemed confidential and exempt by Congress. But Congress did not create an exemption for compilations of public records contained in agency files because there is no countervailing societal interest in denying access to that information to the public.

Most governmental agencies do not withhold compiled information which is not otherwise exempt from the public. The Reporters Committee receives many calls from a variety of different requesters seeking access to government compilations of

publicly-available information. This publicly-available information includes such items as ambulance service lists, criminal convictions, and state-generated public health studies. Rarely, if ever, has a requester told the Reporters Committee that he or she was denied the compilation on the grounds that the individual components were publicly available from other sources. If this Court reverses the Court of Appeals decision, it will create an entirely new FOI Act exemption, a "publicly available" exemption that Congress clearly never contemplated or desired.

If government agencies are permitted to withhold compilations of information simply because a requester might be able to obtain pieces of that information elsewhere, public access to a variety of different information which had previously been disclosed under

the FOI Act will be severely compromised. Consider just a few examples:

> The Department of Health and Human Services collects drug abuse and overdose information from hospital emergency room around the country. The Department uses the information to monitor national trends and develop treatment programs. This statistical information is voluntarily provided by the states to the federal government and often replicates information maintained by state regulatory agencies and state hospitals.[3] An FOI Act requester in

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[3] See, e.g., Kentucky Open Records Act Sec. 61.878 (2)("No exemption in this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person."); Virginia Freedom of Information Act Sec. 2.1-342 (3)("For purposes of this chapter such

> Indiana may be writing a piece on heroin addiction in the fifty states and would like to utilize the federal compilation for his or her research. Under the present FOI Act scheme, the Department of Health and Human Services could not tell this requester that he or she must file an FOI Act request in each state for the individual state records, but if this Court reverses the decision below, the requester will be required to duplicate the time, energy and money already expended by the agency to compile the information.

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[3] Continued
statistical summaries...shall be open to inspection.").

The Nuclear Regulatory Commission compiles various types of information including technical reports, licenses and all newspaper and magazine articles dealing with nuclear energy production. The agency now makes these compilations available to the public in its public reading room. However, the Nuclear Regulatory Commission could decide that it need no longer do so if this Court holds that the Department of Justice does not have to disclose its compilations to the public.

The Department of Health and Human Services compiles annual morbidity statistics to keep track of the number of deaths per year due to specific diseases. State health agencies and hospitals compile these statistics for

their own use and then voluntarily collate and share that information with the federal government. This information is available from the state agencies as well as the federal government. Yet, the federal government routinely discloses this type of information under the FOI Act.

At the present time, members of the news media and other FOI Act requesters are granted access to government compilations of information which are not otherwise exempt from disclosure. In denying access to compilations of district court decisions, the Department of Justice is withholding information when it clearly lacks legal authority to do so.

At the heart of the Department of Justice's refusal to disclose the district

court decisions is the excuse of administrative burden. The Tax Division simply does not want the responsibility of making this information available to the public. The Department of Justice would have the public pay twice to gain access to compiled information: once when the Department actually compiles it, and again when the individual is required to chase down that same information from many sources across the country. As a practical matter, the administrative cost to the Tax Division of making these decisions available to the public would be minimal. All a Tax Division employee need do is make a photocopy of the opinion when he or she receives it and place it in a central location where the FOI Act officer can disseminate it to the public upon request. In contrast, an FOI Act requester would have to locate the decisions, or other components

of the compiled information, at their original sources, expending time, money and energy that the government has already expended. Neither the letter nor the spirit of the FOI Act permits such a result.

CONCLUSION

For the above reasons, the Reporters Committee urges the Court to affirm the Court of Appeals decision and uphold the public right to receive compiled information under the FOI Act.

Respectfully submitted,

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